

San Francisco Law Library

436 CITY HALL

No. 133400

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

25-19
No. 11865

United States
Circuit Court of Appeals
For the Ninth Circuit.

TRANS-PACIFIC AIRLINES, LIMITED,
a corporation,
Appellant,

VS.

HAWAIIAN AIRLINES, LIMITED,
a corporation,
Appellee.

Transcript of Record


Upon Appeal from the District Court of the United States
for the Territory of Hawaii

FILED

JUN 24 1948

PAUL P. O'BRIEN,

CLERK



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

No. 11865

United States
Circuit Court of Appeals
For the Ninth Circuit.

TRANS-PACIFIC AIRLINES, LIMITED,
a corporation,
Appellant,

vs.

HAWAIIAN AIRLINES, LIMITED,
a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Hawaii

No 1185

THE COURT OF COMMONS
IN PARLIAMENT ASSEMBLED
DO PASS AN ACT

TO AMEND THE LAW
RELATIVE TO THE

REGISTRATION OF
MARRIAGES

1854

Enacted by the Queen's most Excellent Majesty
in the fifth year of Her Majesty's said Majesty's

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Bond on	24
Certificate of Clerk to Transcript of Record on.....	79
Designation of Record on.....	26
Notice of.....	23
Statement of Points on.....	86
Bond on Appeal.....	24
Certificate of Clerk to Transcript of Record on Appeal	79
Complaint	2
Decree	15
Defendant's Exhibits:	
A—Letter of Registration.....	80
C—Petition to Intervene.....	81
Designation of Record on Appeal.....	26
Findings of Fact and Conclusions of Law.....	13
Conclusions of Law.....	14
Findings of Fact.....	13

Memorandum of Ruling Upon Motion for Preliminary Injunction.....	9
Motion for Order to Show Cause Why a Preliminary Injunction Should Not Issue.....	4
Affidavit of Stanley C. Kennedy.....	5
Affidavit of Ford Studebaker.....	6
Names and Addresses of Attorneys of Record..	1
Notice of Appeal.....	23
Order to Show Cause.....	8
Statement of Points Pursuant to Rule 75 (d), Federal Rules of Civil Procedure.....	86
Transcript of Proceedings.....	27
Writ of Permanent Injunction.....	19
Marshal's Return.....	22

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

For the Plaintiff, Hawaiian Airlines, Limited,

ROBERTSON, CASTLE & ANTHONY,

By GARNER ANTHONY,

312 Castle & Cooke Building,

Honolulu 1, Hawaii.

For the Defendant, Trans-Pacific Airlines, Ltd.,

FREDERICK L. HEWITT,

68 Post Street, San Francisco 4, Calif.

SAI CHOW DOO,

COATES LEAR,

FONG, MIHO & CHOY,

1128 Smith Street,

Honolulu, T. H.

Amicus Curiae, Civil Aeronautics Board,

UNITED STATES DISTRICT ATTORNEY,

Federal Building,

Honolulu, T. H.

By EDWARD A. TOWSE,

Assistant United States

District Attorney. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court for the
Territory of Hawaii

Civil No. 817

HAWAIIAN AIRLINES, LIMITED,
Plaintiff,

vs.

TRANS-PACIFIC AIRLINES, LTD.,
Defendant.

COMPLAINT

Plaintiff, Hawaiian Airlines, Limited, a corporation incorporated under the laws of the Territory of Hawaii, complaining of Trans-Pacific Airlines, Ltd., a corporation incorporated under the laws of the Territory of Hawaii alleges:

1.

That plaintiff is the holder of a certificate of public convenience and necessity issued to it pursuant to Section 401 of the Civil Aeronautics Act of 1938, 49 U.S.C., Sec. 481, authorizing it to engage in the transportation of persons, property and mail between points within the Territory of Hawaii and since the issuance of said certificate in 1939, has continuously engaged in such air transportation as an air carrier pursuant to said act.

2.

The jurisdiction of this court is based upon [6] Section 1007 of the Civil Aeronautics Act of 1938 as amended, 52 Stat. 1025; 49 U.S.C., Sec. 647.

3.

Defendant, Trans-Pacific Airlines, Ltd., is an air carrier within the meaning of the Civil Aeronautics Act of 1938 as amended and is now engaged in air transportation carrying persons and property between points within the Territory of Hawaii by air as a common carrier and since January 1, 1947, has continuously engaged in such transportation without having a certificate of public convenience and necessity from the Civil Aeronautics Board required under Sec. 401 of the Civil Aeronautics Act of 1938 as amended.

4.

That defendant now conducts a regularly scheduled air carrier service between points within the Territory of Hawaii in violation of the Civil Aeronautics Act of 1938 to the great damage of plaintiff, the holder of a certificate of public convenience and necessity issued pursuant to said act.

Wherefore, plaintiff prays that defendant, its respective agents, servants and attorneys be perpetually enjoined from operating as an air carrier engaged in air transportation in violation of Sec. 401 of the Civil Aeronautics Act of 1938 as amended and that pending the final determination of this cause that a preliminary [7] injunction issue restraining said defendants from said acts.

Dated: Honolulu, Hawaii, September 3, 1947.

/s/ GARNER ANTHONY,

Attorney for Plaintiff.

Territory of Hawaii,
City and County of Honolulu—ss.

Stanley C. Kennedy, being first duly sworn under oath deposes and says:

That he is president of Hawaiian Airlines, Limited, plaintiff in the above cause; that he has read the foregoing Complaint, knows the contents thereof and that the same is true.

/s/ STANLEY C. KENNEDY.

Subscribed and sworn to before me this 3rd day of September, 1947.

[Seal] /s/ CHARLES Y. AWANA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires: June 30, 1949.

[Endorsed]: Filed Sept. 3, 1947. [8]

[Title of District Court and Cause.]

MOTION FOR ORDER TO SHOW CAUSE
WHY A PRELIMINARY INJUNCTION
SHOULD NOT ISSUE

Plaintiff above named moves the court for the issuance of an order to show cause why a preliminary injunction should not issue herein against defendant, its respective agents, servants and attorneys pending this suit and until further order of this court.

This motion is based upon the verified complaint filed in the above cause and the affidavits hereto attached.

Dated: Honolulu, Hawaii, September 3, 1947.

/s/ GARNER ANTHONY,
Attorney for Plaintiff. [9]

AFFIDAVIT

Territory of Hawaii,
City and County of Honolulu—ss.

Stanley C. Kennedy, being first duly sworn under oath deposes and says:

That he is the president of Hawaiian Airlines, Limited, plaintiff in the foregoing action; that defendant is an air carrier engaged in air transportation carrying and offering to carry the public generally and its property between points in the Territory of Hawaii substantially paralleling plaintiff's operation within the said territory; that defendant since January 1, 1947, has conducted and now conducts a regular daily service as an air carrier engaged in air transportation between points within the territory; that it has an agent known as "Pacific Travel Bureau" with offices at 1113 Smith Street, Honolulu, and offices on the islands of Hawaii, Maui and Kauai which agent books and tickets defendant's passengers for travel by air on defendant's regularly scheduled routes between points within the Territory of Hawaii; that defendant's agent, Pacific Travel Bureau, for more than three months last past has advertised the service of de-

fendant as "Flights daily to all islands," said advertisements have appeared recurrently in daily newspapers published and circulated in Honolulu and elsewhere throughout the Territory of Hawaii; that defendant's agent, Pacific Travel Bureau, has similarly advertised defendant's daily air transportation by handbills distributed on the islands of [10] Hawaii, Maui and Kauai; that the conduct of said defendant as a regular scheduled air carrier has continued for a period of more than three months last past; that defendant's operations are that of a common carrier engaged in air transportation between points within the territory.

/s/ STANLEY C. KENNEDY.

Subscribed and sworn to before me this 3rd day of September, 1947.

[Seal] /s/ CHARLES Y. AWANA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949. [11]

AFFIDAVIT

Territory of Hawaii,
City and County of Honolulu—ss.

Ford Studebaker, being first duly sworn, under oath deposes and says:

That he is the vice president of Hawaiian Airlines, Limited, plaintiff in the foregoing action, in charge of Operations and Development; that plaintiff is an air carrier holding a certificate of public convenience and necessity issued under the Civil

Aeronautics Act of 1938, engaged in air transportation between points within the Territory of Hawaii; that Trans-Pacific Airlines, Ltd., is an air carrier engaged in air transportation between points within the Territory of Hawaii and holds no certificate of public convenience and necessity issued under the Civil Aeronautics Act of 1938; that he has observed the operations of Trans-Pacific Airlines, Ltd., particularly since January, 1947; that said defendant operates three aircraft of DC-3 type being Numbers NC63376, NC62083 and NC62086 between the several airports of the Territory of Hawaii and holds itself out to carry the public generally within the limits of its capacity; that he knows of his own knowledge that since January 1, 1947, and continuously to the date hereof, defendant has engaged in a regularly scheduled operation as an air carrier engaged in air transportation between points within the Territory of Hawaii; that in the months of July and August, 1947, he caused a survey to be made of defendant's operations [12] under his direction and control, checking the arrival and departure of defendant's aircraft at the Honolulu Airport and other airports within the Territory of Hawaii as a result of which affiant obtained details of departures and arrivals of defendant's aircraft which verified the facts of defendant's daily operations as observed by him; that from affiant's own observation and the check of arrivals and departures affiant says that defendant is engaged as an air carrier in air transportation on a

regular schedule between points within the Territory of Hawaii as a common carrier.

/s/ FORD STUDEBAKER.

Subscribed and sworn to before me this 3rd day of September, 1947.

[Seal] /s/ CHARLES Y. AWANA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

[Endorsed]: Filed Sept. 3, 1947. [13]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

It is hereby ordered that defendant appear before the undersigned presiding judge of the United States District Court for the Territory of Hawaii at his court room in the Federal Building, Honolulu, on Tuesday, September 9, 1947, at 10 o'clock a.m. to show cause, if any, why a preliminary injunction should not issue against it as prayed for in plaintiff's complaint.

Dated: Honolulu, Hawaii, September 3, 1947.

/s/ J. FRANK McLAUGHLIN,
District Judge.

[Endorsed]: Filed Sept. 3, 1947. [14]

[Title of District Court and Cause.]

MEMORANDUM OF RULING UPON MOTION
FOR PRELIMINARY INJUNCTION

J. Frank McLaughlin, Judge.

Attorneys for Plaintiff:

Robertson, Castle & Anthony, 312 Castle & Cooke
Building, Honolulu, Hawaii.

Attorneys for Defendant:

Sai Chow Doo, Honolulu, T. H.; Frederick L.
Hewitt, 68 Post Street, San Francisco 4, Calif.

On Sept. 3, 1947, the plaintiff filed its complaint against the defendant and prayed for a temporary and permanent injunction. An order to show cause issued returnable Sept. 9, at which time the defendant appeared and orally moved to dismiss the cause for lack of jurisdiction.

Against the motion, technicalities as to form, etc., being waived, the plaintiff's allegations must be taken for present purposes as true. The facts with which the Court is presently concerned are:

1. The plaintiff is a certificated air carrier under Section 481 (a) of Title 49, U.S.C. (Civil Aeronautics Act of 1938, engaged since 1939 in air transportation of persons and property in the Territory of Hawaii.
2. The defendant is also an air carrier so engaged except that it does not hold a certificate of public convenience and necessity under

said Section 481 (a), and has since January been continuously engaged in scheduled operations.

Those are the pleaded facts. Upon the return to the order the defendant orally showed in connection with its motion to dismiss that it:

- a. Held a safety certificate issued Oct. 10, 1946, by the Civil Aeronautics Administration.
- b. Held a Civil Aeronautics Board letter of registration—No. 163—as a Non-Certificated Irregular Air Carrier to operate under the Board's Economic Regulations 292.1 dated May 5, 1947 (12 F. R. 3077), which letter expressly states that it is not a certificate of public convenience and necessity.
- c. Had pending before the C.A.B. an application under 49 U.S.C., Sec. 481 (a) for a certificate of public convenience and necessity, in connection with which it had petitioned for a prompt hearing and for an exemption to operate without such a certificate pending the hearing (49 U.S.C., Sec. 496).
- d. Agreed that no formal complaint had been filed by the plaintiff with the C.A.B. regarding the matter here complained of (49 U.S.C. 642).

Argumentatively the defendant took the position that the plaintiff had alleged no violation of the Civil Aeronautics Act, and that in any event the action was premature in that plaintiff had not resorted to nor exhausted administrative remedies.

Further, claiming that the certificate which it did hold allowed it to operate as it had been doing, defendant denied the existence of an equitable basis for granting plaintiff the relief prayed for.

The motion to dismiss for lack of jurisdiction is denied and a temporary injunction will issue upon proper bond, for as this situation is viewed by the Court:

- A. The Civil Aeronautics Act gives this Court jurisdiction to act at the request of a party in interest, such as is the plaintiff, when, as here, a violation of Sec. 481 (a) is alleged (49 U.S.C. Sec. 647) ;
- B. The remedies afforded by the Act are permissive, not mandatory. In order to afford a prompt means of relief, Congress by this Act has given a party in interest the right of either administrative or judicial complaint, at its election. As there is no administrative complaint pending before the Board with regard to this alleged violation, this Court has no cause for refraining from acting until administrative remedies are exhausted.
- C. The facts at the moment spell out a clear case of violation in Sec. 481 (a) of Title 49, U.S.C.

The question before the Court is not, Should another air carrier certificated under Sec. 481 (a) be allowed to operate in the Territory? That is purely a question for the Board's determination upon defendant's pending application.

What is before the Court is, Should the defendant be allowed to continue operating as if it had such a certificate of public convenience and necessity in violation of the Act?

The answer is clearly No, and plaintiff being a proper party to ask for statutory relief against such unlawful competition, its remedy at law by successive suits for damage being inadequate, a certificate of public convenience and necessity being worthless unless protected in the manner [25] provided for by Congress, as had been stated, a temporary injunction will issue. This temporary injunction will restrain defendant from operating in violation of the Act. In other words, it may operate under its present certificate as an irregular air carrier engaged under Sec. 292.1 of the Economic Regulations—and as there provided—in non-scheduled flights. But until such a time as it obtains its certificate of public convenience and necessity under Sec. 481 (a), it may not act as, nor hold itself out as being, an air carrier engaged in regularly scheduled flights.

The form of the temporary injunction and the amount of the bond will be settled upon notice.

Dated at Honolulu, Territory of Hawaii, this 9th day of September, 1947.

/s/ J. FRANK McLAUGHLIN,
Judge. [26]

[Endorsed]: Filed Sept. 11, 1947. [22]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

(1) Hawaiian Airlines, Limited, is a holder of a certificate of public convenience and necessity issued to it by the Civil Aeronautics Board (Authority) on June 19, 1939, pursuant to Sec. 401(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a), authorizing it to engage in air transportation in the transportation of passengers, property and mail between points within the Territory of Hawaii.

(2) Trans-Pacific Airlines, Ltd., is an air carrier and an American citizen within the meaning of the Civil Aeronautics Act of 1938 as amended, engaged in air transportation, carrying persons and property between points within the Territory of Hawaii as a common carrier and from January 1, 1947 to September 11, 1947, conducted a regular scheduled daily service as a common carrier between points within the Territory of [82] Hawaii without having a certificate of public convenience and necessity from the Civil Aeronautics Board.

(3) That Trans-Pacific Airlines, Ltd., is an irregular air carrier having a Letter of Registration issued to it by the Civil Aeronautics Board, but during the period January 1, 1947 to September 11, 1947, has not operated within the allowable limits of Sec. 292.1 of the Economic Regulations of the Civil Aeronautics Board.

Conclusions of Law:

(1) That Hawaiian Airlines, Limited, being the holder of a certificate of public convenience and necessity from the Civil Aeronautics Board has a limited franchise to engage in air transportation between points within the Territory of Hawaii which rights have been repeatedly damaged by the unlawful operations of Trans-Pacific Airlines, Ltd., in the conduct of its regular daily scheduled service between points within the Territory of Hawaii during the period January 1, 1947 to September 11, 1947.

(2) That Trans-Pacific Airlines, Ltd., having operated a daily scheduled regular service from January 1, 1947 to September 11, 1947, in violation of Economic Regulations 292.1, Civil Aeronautics Board, has not operated under any exemption pursuant to Sec. 416 of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 496(b) or any rule, regulation or order of the Civil Aeronautics Board.

(3) That Trans-Pacific Airlines, Ltd., during the period January 1, 1947 to September 11, 1947, has been in continuous and repeated violation of Sec. 401(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a); that the violations by Trans-Pacific Airlines, Ltd., have been to the damage of plaintiff, Hawaiian Airlines, Limited, which has no plain adequate or complete remedy at law.

(4) That unless permanently enjoined, the continued operations of defendant, Trans-Pacific Airlines, Ltd., will result in repeated and recurring injuries to plaintiff and plaintiff's remedy in dam-

ages is inadequate; that this court has jurisdiction to enforce by way of injunction defendant's violations of Sec. 401(a) of Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a), pursuant to Sec. 1007(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 647.

(5) A decree permanently enjoining Trans-Pacific Airlines, Ltd., from future violations of Sec. 401(a) of the Civil Aeronautics Act of 1938 as amended, will be signed on presentation.

Dated: Honolulu, Hawaii, November 10, 1947.

/s/ J. FRANK McLAUGHLIN,
District Judge.

[Endorsed]: Filed Nov. 10, 1947. [84]

In the United States District Court
for the Territory of Hawaii

HAWAIIAN AIRLINES, LIMITED,
Plaintiff,

vs.

TRANS-PACIFIC AIRLINES, INC., LTD.,
Defendant.

DECREE

The above cause having come on for final hearing, and the issues having been tried before the court without a jury upon the complaint of Hawaiian Airlines, Limited, plaintiff, and the answer, counter claim and cross complaint of defendant,

Trans-Pacific Airlines, Ltd., and the court having entered an order for separate trial on October 13 1947, of the original complaint for injunction and the defendant's answer, and having severed the counter claim and cross complaint of Trans-Pacific Airlines, Ltd., and directed that the trial of the cause of action relating to injunctive relief proceed upon the complaint and answer and that a separate judgment be entered thereon pursuant to Rule 54, and the court having heard evidence of the parties and having made its findings of fact and conclusions of law, and it appearing to the satisfaction of the court that defendant, Trans-Pacific Airlines, Ltd., is an air [86] carrier engaged in air transportation as a common carrier for hire operating a regular scheduled daily service between points within the Territory of Hawaii from January 1, 1947 to September 11, 1947, without having a certificate of public convenience and necessity issued to it pursuant to Section 401(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a) and it appearing that defendant was not operating within any exemption pursuant to Section 416 of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 496(b), or any rule, regulation or order of the Civil Aeronautics Board and it further appearing that Hawaiian Airlines, Limited, plaintiff, is a party in interest and will suffer damage and recurring damage in the event a permanent injunction is not granted and it further appearing that this court has jurisdiction to grant the relief prayed for pursuant to Section 1007(a) of the Civil

Aeronautics Act of 1938 as amended, 49 U.S.C. 647, and that plaintiff is entitled to the issuance of a permanent injunction as prayed for,

Now, therefore, it is ordered, adjudged and decreed:

That a writ of permanent injunction issue forthwith restraining Trans-Pacific Airlines Ltd., defendant, its officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise [87]

(1) From engaging in air transportation in violation of Section 401(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a);

(2) From holding out to the public, expressly or by course of conduct, that it conducts air operations of greater regularity than that permitted by Economic Regulations No. 292.1, Civil Aeronautics Board; that "holding out" as used in this paragraph shall include advertisements by newspapers, radio, magazines, handbills, signs or other written or oral solicitation;

(3) This injunction will not prohibit operations of defendant in accordance with the exemption granted it by the Civil Aeronautics Board in Economic Regulations, Section 292.1 as amended June 10, 1947, exempting irregular air carriers as authorized by Section 416 of the said Act (49 U.S.C. 496(b)); provided, however, that violation of said regulation and of this injunction shall be determined by the application of the standard of regularity currently adopted by the Civil Aeronautics

Board, to wit: the operation of aircraft between points or within the Territory of Hawaii in air transportation of persons and property regularly or with a reasonable degree of regularity, which regularity is reflected by the operation of a single flight per week on the same day of each week between the same two points, or is reflected by the recurrence of operations of two round-trip flights, or flights varying from two to three or more such flights, between any same two points each week in succeeding [88] weeks, without there intervening other weeks or approximately similar periods at irregular but frequent intervals during which no such flights are operated so as thereby to result in appreciable definite breaks in service. It is intended by this decree to require irregularity in service between any such points but not to preclude the operation of more than one or two such flights in any given week, nor to prescribe any special maximum limitation upon the number of flights which may be performed in any one week, if infrequency and irregularity of service is otherwise achieved through variations in number of flights and intervals between flights and through frequent and extended definite breaks in service. The word "point" is herein defined as an airport and all territory in a 25-mile radius;

(4) Leave to apply for a modification of this decree and the writ issued in pursuance hereof is hereby granted either party in the event the Civil Aeronautics Board shall hereafter modify or rescind the aforesaid regulations or its interpretation placed thereon by said agency;

(5) Jurisdiction of this cause is retained for the purpose of giving full effect to this decree and for the purpose of making such further and other orders and decrees or taking such further action, if any, as may become necessary or appropriate to carry out and enforce this decree.

Dated: Honolulu, Hawaii, November 10, 1947.

/s/ J. FRANK McLAUGHLIN,
Judge, United States District
Court, Territory of Hawaii.

[Endorsed]: Filed Nov. 10, 1947. [89]

[Title of District Court and Cause.]

WRIT OF PERMANENT INJUNCTION

The President of the United States of America to Trans-Pacific Airlines, Ltd., its officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice hereof by personal service or otherwise, Greeting:

Whereas, this court on November 10, 1947, entered its decree finding that Trans-Pacific Airlines, Ltd., is an air carrier engaged in air transportation as a common carrier for hire which during the period January 1, 1947 to September 11, 1947, operated a regular scheduled daily service between points within the Territory of Hawaii without having a certificate of public convenience and necessity issued to it pursuant to Section 401(a)

of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a); and that said defendant was not operating within any exemption pursuant to Section 416 of the Civil Aeronautics Act of 1938, as amended, 49 U.S.C. 496(b), or under any [91] ruling, regulation or order of the Civil Aeronautics Board and it further appearing that Hawaiian Airlines, Limited, plaintiff, is a party in interest and has suffered great damage and recurring damage as a result of defendant's unlawful operations and will continue to suffer recurring damage unless defendant is permanently enjoined from its unlawful operations, and the court having found that it has jurisdiction to grant the relief prayed for pursuant to Section 1007(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 647;

Now therefore you and each of you are hereby permanently enjoined and restrained until further order of this court from doing or omitting to do any of the following acts:

(1) From engaging in air transportation in violation of section 401(a) of the Civil Aeronautics Act of 1938 as amended, 49 U.S.C. 481(a);

(2) From holding out to the public, expressly or by course of conduct, that it conducts air operations of greater regularity than that permitted by Economic Regulations No. 292.1, Civil Aeronautics Board; that "holding out" as used in this paragraph shall include advertisements by newspapers, radio, magazines, handbills, signs or other written or oral solicitation;

(3) This injunction will not prohibit operations of defendant in accordance with the [92] exemption granted it by the Civil Aeronautics Board in Economic Regulations, section 292.1 as amended June 10, 1947, exempting irregular air carriers as authorized by section 416 of said Act (49 U.S.C. 496(b)); provided, however, that violations of said regulation and of this injunction shall be determined by the application of the standard of regularity currently adopted by the Civil Aeronautics Board, to wit: the operation of aircraft between points or within the Territory of Hawaii in air transportation of persons and property regularly or with a reasonable degree of regularity, which regularity is reflected by the operation of a single flight per week on the same day of each week between the same two points, or is reflected by the recurrence of operations of two round-trip flights, or flights varying from two to three or more such flights, between any same two points each week in succeeding weeks, without there intervening other weeks or approximately similar period at irregular but frequent intervals during which no such flights are operated so as thereby to result in appreciable definite breaks in service. It is intended by this injunction to require irregularity in service between any such points but not to preclude the operation of more than one or two such flights in any given week, nor to prescribe any special maximum limitation upon the number of flights which may be performed in any one week, if infrequency and irregularity of service is otherwise achieved through variations in numbers of flights and [93] intervals

between flights and through frequent and extended definite breaks in service. The word "point" is herein defined as an airport and all territory in a 25-mile radius.

Hereof fail not at your peril.

Witness the Honorable J. Frank McLaughlin, Judge, District Court of the United States for the Territory of Hawaii, and the seal of said court this 10th day of November, 1947.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk.

Let the foregoing Writ issue.

/s/ J. FRANK McLAUGHLIN,
District Judge. [94]

United States Marshal's Office

MARSHAL'S RETURN

The within Writ of Permanent Injunction was received by me on the 10th day of November, A. D. 1947, and is returned executed this 10th day of November, A. D. 1947 by leaving with Ellen Kondo, Secretary to Ruddy F. Tongg, known to me to be the President of the Trans-Pacific Airlines, Ltd., a true copy of Writ of Permanent Injunction.

/s/ OTTO F. HEINE,
United States Marshal,
District of Hawaii.

Dated at Honolulu, T. H., this 12th day of November, A. D. 1947. [95]

In the United States District Court for the
Territory of Hawaii
Civil No. 817

HAWAIIAN AIRLINES, LIMITED,
Plaintiff,
vs.

TRANS-PACIFIC AIRLINES, LTD.,
Defendant and Third Party Plaintiff,
vs.

INTER-ISLAND STEAM NAVIGATION COM-
PANY, LIMITED,
Third Party Defendant.

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that Trans-Pacific Airlines, Ltd., defendant, and third party plaintiff, above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order of permanent injunction entered in this action on November 10, 1947.

Dated: Honolulu, T. H., November 20, 1947.

/s/ SAI CHOW DOO,
/s/ FREDERICK L. HEWITT,
/s/ COATES LEAR,

Attorneys for Appellants.

FONG, MIHO & CHOY,

By /s/ HIRAM L. FONG,

Attorneys for Appellants.

[Endorsed]: Filed Nov. 20, 1947. [115]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents: That we, Trans-Pacific Airlines, Ltd., a Hawaiian corporation of Honolulu, Territory of Hawaii, as principal and Norman Nip and Howard Chun of Honolulu, Territory of Hawaii as sureties, are held and firmly bound unto Hawaiian Airlines, Limited and Inter-Island Steam Navigation Company, Ltd., Hawaiian corporations, of Honolulu, Territory of Hawaii, in the penal sum of Two Hundred and Fifty Dollars (\$250.00) for the payment of which, well and truly to be made to the said Hawaiian Airlines, Limited and Inter-Island Steam Navigation Company, Ltd., the said Trans-Pacific Airlines, Ltd., as principal and Norman Nip and Howard Chun as sureties by these presents do bind themselves, their respective successors, heirs, executors and assigns, jointly and severally, and firmly by these presents. The condition of this obligation is such that whereas the above bounden [117] principal has filed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of permanent injunction entered in the above entitled cause by the United States District Court for the Territory of Hawaii;

Now, Therefore, if the said principal shall prosecute its appeal with effect and pay all costs if it fails to sustain said appeal then this obligation shall

be void, otherwise it shall remain in full force and effect.

In Witness Whereof, the said Trans-Pacific Airlines, Ltd., has caused these presents to be executed by its duly authorized officers and its corporate seal to be affixed hereto, and the said Norman Nip and Howard Chun have hereunto set their hands this 19th day of November, 1947.

[Seal] TRANS-PACIFIC AIRLINES,
LIMITED,

By /s/ RUDDY F. TONGG,
President.

By /s/ SAI CHOW DOO,
Treasurer,
Principal.

/s/ NORMAN NIP,
/s/ HOWARD CHUN,
Sureties. [118]

AFFIDAVIT OF SURETIES

Territory of Hawaii,
City and County of Honolulu—ss.

Norman Nip and Howard Chun being first duly sworn, each for himself and not for the other, under oath deposes and says: That they are sureties on the foregoing bond; that they are residents of Honolulu, Territory of Hawaii, and have property situated within said Territory subject to execution and

that they are worth in such property more than double the amount of the penalty specified in said bond over and above all their just debts and liabilities and property exempt from execution.

/s/ NORMAN NIP,

/s/ HOWARD CHUN.

Subscribed and sworn to before me this 19th day of November, 1947.

/s/ TAI QUAN CHING,

Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires June 30, 1949.

[Endorsed]: Filed Nov. 20, 1947. [119]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the United States District Court for the District of Hawaii:

Please prepare and certify a transcript of the complete record and all the proceedings and evidence in this case to be filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal herein.

Dated: Honolulu, T. H., this 31st day of January,
1948.

/s/ SAI CHOW DOO,

/s/ COATES LEAR,

Attorneys for Trans-Pacific
Airlines, Ltd.

Of Counsel:

FONG, MIHO & CHOY,

FREDERICK L. HEWITT,

Alakea and King Streets,
Honolulu, T. H.,

[Endorsed]: Filed Jan. 31, 1948. [123]

In the United States District Court for the
Territory of Hawaii

Civil No. 817

HAWAIIAN AIRLINES, LIMITED,

Plaintiff,

vs.

TRANS-PACIFIC AIRLINES, LIMITED,

Defendant and Third Party Plaintiff,

vs.

INTER-ISLAND STEAM NAVIGATION COM-
PANY, LIMITED,

Third Party Defendant.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S.
District Court, Honolulu, T. H., on October 13, 1947.
Before: Hon. J. Frank McLaughlin,
Judge.

Appearances:

J. Garner Anthony, Esq., appearing for Hawaiian Airlines, Ltd., and Inter-Island Steam Navigation Co., Ltd.;

William F. Quinn, Esq., appearing for Hawaiian Airlines, Ltd., and Inter-Island Steam Navigation Co., Ltd.; [126]

Frederick L. Hewitt, Esq., appearing for Trans-Pacific Airlines, Ltd.;

Coates Lear, Esq., appearing for Trans-Pacific Airlines, Ltd.;

Sai Chow Doo, Esq., appearing for Trans-Pacific Airlines, Ltd.;

Fong, Miho & Choy, Attorneys-at-Law, appearing for Trans-Pacific Airlines, Ltd.;

Edward A. Towse, Esq., Assistant United States Attorney, appearing on behalf of the Civil Aeronautics Board as Amicus Curiae. [127]

PROCEEDINGS

The Clerk: Civil No. 817, Hawaiian Airlines, Limited, Plaintiff, versus Trans-Pacific Airlines, Limited, Defendant; case called for trial on complaint filed therein.

The Court: Are the parties ready?

Mr. Anthony: The Plaintiff is ready.

Mr. Hewitt: Ready, your Honor.

The Court: On Thursday, when we had under consideration the motions in relation to the anti-trust phase of this case, I notified counsel, after

listening to their arguments, that I would take the matter under advisement and announce on Monday what my ruling would be. I have checked into the authorities and read those that counsel have called to my attention, and as a result thereof and in view of the nature of the cross-claim and counter-claim filed herein I am going, under Rule 13(h), to order that the Inter-Island Steam Navigation Company, Limited, be brought in as a party Defendant. I do that in order that in this one litigation all issues may be resolved and in view of the nature of the counter-claim it is not possible, as the allegations now stand and which must for present purposes be taken as true, to do complete relief in the premise without bringing in the Inter-Island Corporation.

Accordingly, I will direct that an appropriate summons issue to that third party Defendant, and that new and proper service be made upon it. [131]

Mr. Anthony: Your Honor, we waive the issuance of any further summons. Just the ruling of the Court—as I told your Honor, I was concerned with the validity of it.

The Court: Very well.

Mr. Anthony: We will consider that the Inter-Island Steam Navigation Company, the President of which is here, has been served.

The Court: And will you represent it also?

Mr. Anthony: Yes, your Honor.

The Court: Very well. We now, then, proceed this morning to a trial on the merits of that original phase of this case which we have called the injunction phase. And I have just a few minutes ago

signed an Order, confirming an oral Order heretofore made, separating the trials.

Mr. Hewitt: Your Honor, I'd like to make a motion that the law firm of Fong, Miho and Choy make an appearance in this case as attorneys, additional attorneys for the Defendant.

The Court: Very well.

Mr. Hewitt: And before Plaintiff begins to put in his case, your Honor, I have several matters I would like to take up, again going to the jurisdiction of this matter. If it pleases the Court, I would like to go ahead now, or whenever it is convenient to the Court.

The Court: Well, I take it that you are going to make some oral motions, is that it? [132]

Mr. Hewitt: That's correct, your Honor, yes.

The Court: All right. Let us hear what they are.

Mr. Hewitt: Under the Federal Rules of Civil Procedure, Rule 12(h), it states as follows—if it pleases the Court, I'd like to read this into the record, 12(h), part two:

“That, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”

On that basis I wish to make a motion to dismiss the Complaint and vacate the Preliminary Injunction upon the following grounds:

Trans-Pacific, the Defendant in this matter, is exempt from Section 401 of the Civil Aeronautics Act. Section 401 is also 49 U. S. Code Supplement

481. I'd like to read that section, your Honor, in order to lay a foundation for what I have to say further regarding it.

“No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.”

I wish to call particularly to the Court's attention—

The Court: Excuse me. Forty-nine what?

Mr. Hewitt: That's 49, 481.

The Court: Yes.

Mr. Hewitt: That is the section that the Plaintiff [133] is proceeding under. That section says nothing about a Certificate of Public Convenience and Necessity. It says except as to air transportation. In other words, no one could operate any kind of air transportation without a Certificate of Public Convenient and Necessity, except as provided in Section 416. Now, before I get to 416, I'd like to mention what it says in Section 292.1 of the Economic Regulations. If you haven't a copy of that, your Honor—

The Court: I had seen it many times and there is a copy available in the pleadings here.

Mr. Hewitt: Before reading Section 292.1, I'd like to go back to 401 again for a moment and point out that it was the original intention of Congress that no air carrier could operate any kind of air carrier service unless they had a Certificate of Convenience and Necessity. It was not the intention to avoid certificates of other type. In other words,

if you read the sections together, 416 and 401, you will find that 416 specifically gives the Board a right to exempt certain carriers. So 401 doesn't mean exactly what it says.

Section 292.1 is a specific exemption under 416(b), Section 416(b), which is also known as 49 U. S. Code 496. It reads as follows; paragraph "c" of Section 292.1 of the regulations states:

"Except as otherwise provided in this section, [134] Irregular Air Carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, other than the following:

- (i) Subsection 401(1) (Compliance with Labor Legislation);
- (ii) Section 403 (Tariffs);
- (iii) Subsection 404(a) (Carrier's Duty to Provide Service, etc.)"

It should be particularly noted that Section 292.1, which is issued pursuant to Section 416(b) of the Civil Aeronautics Act, provides that certain air carriers shall be specifically exempt. This air carrier—we do not deny that Trans-Pacific is an air carrier. We admit that. It has a specific exemption to operate under 401 of the Civil Aeronautics Act of 1938, as amended.

The certificate of exemption held by Trans-Pacific Airlines has never been questioned by the Board or by anyone else.

I'd like to read Section 416(b), if it pleases the Court, in order that it may be read into the record. Section "b" states as follows:

"The Authority, from time to time and to the extent necessary * * *"

That is 496, your Honor.

"* * * may (except as provided in paragraph (2) of this [135] subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carries, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

That is exactly what the Civil Aeronautics Board did here. It exempted a class of air carriers from operation of 401 of the Civil Aeronautics Act of 1938, as amended. Now, it is interesting to note that paragraph 3 of the Complaint of the Plaintiff states as follows:

"Defendant, Trans-Pacific Airlines, Ltd., is an air carrier within the meaning of the Civil Aeronautics Act of 1938 as amended and is now engaged in air transportation carrying persons

and property between points within the Territory of Hawaii by air as a common carrier and since January 1, 1947, has continuously engaged in such transportation without having a certificate of public convenience and [136] necessity from the Civil Aeronautics Board required under Section 401 of the Civil Aeronautics Act of 1938 as amended.”

That is a gross misstatement of fact. It is not necessary for an air carrier to have a Certificate of Public Convenience and Necessity, as I believe I have been able to point out under this rule. This air carrier is not required to have a Certificate of Public Convenience and Necessity any more than several hundred other air carriers operating under this specific exemption. The exemption is very clear. The Board has the power. It was given the power by Congress to exempt air carriers, and it has exempted this air carrier from the provisions of Section 401. Now, we have been charged——

The Court: Excuse me. Don't you have to read paragraphs 3 and 4 together?

Mr. Hewitt: I will get to paragraph 4, your Honor, in just a minute. That is also very interesting. Paragraph 4—I will read it into the record so that we can get them together, if it pleases the Court.

“That Defendant now conducts a regularly scheduled air carrier service between points within the Territory of Hawaii in violation of the Civil Aeronautics Act of 1938 to the great

damage of Plaintiff the holder of a Certificate of Public Convenience and Necessity [137] issued pursuant to said Act.”

Now, I'd like to refer back to Section 401. Although the allegation in paragraph 4 of the Complaint makes no statement as to 401, it merely says the Aeronautics Act of 1938, paragraph 401 does not say anything about scheduled operations or non-scheduled operations. It says any operations. Certainly paragraph 4 can't refer to 401. If it refers to anything, it refers to a regulation, 292.1. It can't refer to 401 as far as scheduled operations are concerned, because nothing is stated there. It makes no reference to scheduled operations or any other kind of operations. All it says is that no air carrier shall engage in any air transportation. That means all types of air transportation.

I think personally, your Honor, that the Complaint should fail on that ground alone. There is no reference made to it. The Civil Aeronautics Act of 1938 is all-inclusive. It certainly it not required that under the Civil Aeronautics Act of 1938 that this Defendant should have any thing other than it has. They are pleading in this Complaint that we should have a certificate of Public Convenience and Necessity as required. That is not the case, your Honor. What the Court is doing here is trying to enforce 401(a). The Plaintiff has not asked in his Complaint that you enforce 401(a). I think it is very clear. He [138] talks about the Civil Aeronautics Act of 1938. He doesn't say anything about

401(a). It would be very interesting, I think, your Honor, also to call your attention to the Section 401(a) and also 292.1 of the Economic Regulations. What the Court has been trying to do here is not to enforce anything but the regulations. And we contend, your Honor, that the regulations are something that was made by the Civil Aeronautics Authority and should be enforced by them. In other words, this Court is faced with one thing, whether or not there has been a violation. Personally, and looking at the Act itself, reading all the sections together, it doesn't say that the Court has power to determine what a violation of a regulation is.

I would like to call your attention to Section 1007, your Honor, of the Civil Aeronautics Act of 1938, as amended, and I would like to read part of it into the record.

The Court: What is the U.S.C.?

Mr. Hewitt: Forty-nine, U. C. Code, 647.

The Court: All right.

Mr. Hewitt:

“If any person violates any provision of this Act, or any rule, regulations, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Authority, its duly authorized agent, or, in the case of a violation of Section 401(a) of this [139] Act, any party in interest, may apply to the District Court of the United States, for any district wherein such person carries on his business or wherein the

violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and enjoining upon them obedience thereto."

What that is trying to say is this; I tried to point this out once before and I'd like to try and point it out more clearly. Under Section 401 of the Civil Aeronautics Act of 1938, as amended, the Board is granted certain rights to exempt from operation or from requirement under 401 for a Certificate of Public Convenience and Necessity. They issue regulations. Whether or not the regulations are adhered to or not is not the question before the Court. The question before the Court is whether or not there has been a violation of Section 401. And that question can be raised properly, very properly, if in this example there was a [140] *prima facie* violation. In other words, if an air carrier had no exemption under 401, or under 416(b) of the Civil Aeronautics Act of 1938, as amended, or there had been a determination by the Civil Aeronautics Board who has primary jurisdiction over such matters, that there had in fact been a violation, then the Court, any District Court under Section 1007 of the Civil Aero-

navitics Act of 1938, as amended, has the power and the jurisdiction to enforce that. There is nothing in the Act that says that the Court shall have power to determine what a regulation is. As I state again, a regulation is something that has been laid down by the Board. There is nothing in 401 that says that an air carrier shall be scheduled or non-scheduled, or any other air carrier. He shall not engage in air transportation. And that's all that 401 says.

Now, 416 says we'll exempt certain of these operators. They have the power and they have done it. This Defendant is exempt. They are operating under Section 292.1. The question before the Court is the determination of a violation under 401, not an interpretation of 292.1.

I'd like also to call the Court's attention to a case which has some bearing on this. There has been very little law on this point. In fact, it is a new piece of law as far as aeronautics is concerned. I remember a discussion on the Alaska case, Alaska Air Transportation, Inc., versus Alaska [141] Airplane Charter Company, and I'd like to read portions of the Court's opinion. I believe you have a copy of it, haven't you?

The Court: This is the same Alaskan case?

Mr. Hewitt: The same Alaskan case.

The Court: All right.

Mr. Hewitt: The Court said: "Defendant admits that it is engaged in carrying persons and property by air for hire, and that it has not obtained a certificate, but denies that it is a common carrier."

The Court further states:

“The evidence further disclosed that the operation of the Defendant was entirely non-scheduled, confined to so-called charter flights by one 10-place and two 2-place airplanes.”

The Court further stated as follows:

“The Defendant admitted at the hearing that it had no Certificate of Public Convenience and Necessity and was not exempted from such requirement under Section 416(b).”

All right. The cases are not parallel, yet it was made to believe that they were. Now, the sole point in the Alaska case was whether or not we were an air carrier or not. We don't say we are not an air carrier. In fact, as I stated a few moments ago, we admit that we are an air carrier, and we are under Section 292.1. There is no question about it.

Now, the only thing that the Court could do in the [142] Alaska case was to take jurisdiction. There was a *prima facie* violation upon a few facts, a showing of very few facts. It showed absolutely that the Defendant not only didn't have a certificate, which I again state is a Certificate of Public Convenience and Necessity, but he also didn't have any exemption. He didn't have anything. And he was operating airplanes. That is a *Prima facie* violation of Section 401 in that he had no certificate of any kind. It doesn't state anything in 401. I repeat it again, about scheduled or non-scheduled operations. It certainly is not analogous to this case. Here this Defendant not only has an exemption

under 416(b) of the Civil Aeronautics Act of 1938, as amended, but he also has certain other privileges. He has got to comply with the Act. He has got to comply with C.A.R. 42, which pertains to the safety operations. In fact, he has to comply with practically all the sections of the Act.

I'd like to call to the Court's attention what we call the Adler case, which is in 41 Federal Supplement, page 366——

The Court: I read that this morning when you caused it to be sent in to me.

Mr. Hewitt: Well, I didn't intend that you should read it when I sent it in. In fact, I wanted to give it to the Clerk. But I'd like to read part of it in the record. I wanted to have it available to you. That goes to the primary [143] jurisdiction. We claim in this case that the Court has no jurisdiction, that the primary jurisdiction rests with the Civil Aeronautics Board. The Adler case was a very clear case on that point.

The Court: It is entirely different, though, isn't it? That involves somebody complaining because they didn't maintain a schedule.

Mr. Hewitt: That's right. But whether it is in the reverse or not doesn't really make any difference. It lays down the law of primary jurisdiction.

The Court: Well, that may be a sound principle except where a statute such as this one in one particular area gives the Court concurrent jurisdiction with the Board.

Mr. Hewitt: Well, it gives them concurrent jurisdiction, your Honor, but it gives it in terms

of a violation. It doesn't say that the Court can interpret a violation. It makes no reference in any of the parts of the Civil Aeronautics Act that a line can operate a scheduled, non-scheduled, irregular, charter, or anything else. I think it is entirely different, your Honor.

The Court: How do you square your position with the statute and the position taken here by the C.A.B. as *amicus curiae*, which says, as I understand it, that this 401, which is also 481 of Title 49, relates to common carriers?

Mr. Hewitt: I don't think there is any question about [144] it. I think we are a common carrier. I think we are an air carrier. And I also think that we are a common carrier.

I would like to discuss this brief filed by the C.A.B. I planned to do it a little later, but if you'd like to have me do it now, I'd be very glad to because I'd like to tear this thing apart. In the first place, it is not a brief under the terms which they were supposed to submit it. It looks like a trial brief to me.

The Court: In fact, that's what it is denominated.

Mr. Hewitt: Well, that is not the way they are supposed to be in here.

The Court: Well, I don't know exactly whether that is quite a correct statement or not. The request was made by the Government for leave to intervene as *amicus curiae*. That was granted by the consent of all parties concerned and the Court. And the next thing that happened was that they filed this

thing which they denominated a trial brief. No restrictions were actually placed upon it.

Mr. Hewitt: I will agree with the Court on that, but it seems to us to be a very unfair brief in many respects.

The Court: You have all had it in advance of trial, as have I.

Mr. Hewitt: That's right, but we couldn't do anything about it. I would like to read part of this Adler case in the record. [145]

The Court: You may.

Mr. Hewitt:

“Under the primary jurisdiction doctrine, the court was without jurisdiction of action against common carrier by air to recover damages for canceling a scheduled flight requiring plaintiff to make other arrangements for his transportation, where plaintiff failed to show a finding by Civil Aeronautics Board that practice of canceling scheduled flights was unlawful or unreasonable, or that plaintiff exhausted all of his remedies before the Board.”

I'd also like to read this item:

“The primary jurisdiction rule or doctrine provides that when Congress has created an administrative commission, board, or other agency with jurisdiction over and power to regulate some particular field of endeavor, state and federal courts cannot grant relief to any person complaining of any act done or omitted

to have been done if act or omission is of such nature as to be within sphere of regulation of administrative agency involved, until such time as person complaining has exhausted his remedies before such administrative body.”

I’m still reading:

“The proposition advanced by the defendant in support of this motion was the primary jurisdiction question.”

It seems to me that this Court is trying to interpret [146] regulations and trying to determine what a violation is. I don’t believe that that is within the power of the Court to do so. I think the Plaintiff’s Complaint is faulty throughout, as I have already pointed out. I believe that there has been before the Board a Complaint made under Economic Regulation 285.14, which is followed in Section 1002 of the Civil Aeronautics Act of 1938, as amended; 1002 is also known as——

The Court: You mean where Hawaiian appeared in opposition to your application for a Certificate of Public Convenience and Necessity before the Board?

Mr. Hewitt: No, sir, I do not. I refer to something entirely different, which I’d like to read. Section 1002 of the Civil Aeronautics Act of 1938, as amended, is also 49 U.S.C. 466—42—that pertains to persons filing complaints before the Board.

The Court: I thought it was admitted heretofore that in relation to this subject matter that is now our concern this was no matter pending before the administrative board.

Mr. Hewitt: That is correct. And that was a misstatement if there ever was one. I think there definitely has been a complaint before the Board. I think that Counsel for the Plaintiff knew it at the time.

The Court: Well, there is nothing in our record now, is there? [147]

Mr. Hewitt: There is nothing in the record now, but I am going to put something in the record.

The Court: All right. What is it?

Mr. Hewitt: There is a petition that Plaintiff has filed in the matter of the application of Trans-Pacific Airlines, Limited, before the Civil Aeronautics Board, petition to intervene. I want to read——

The Court: Well, that is the same thing I asked you about. You said “no.” That’s where they sought to intervene in connection with your application before the Board for a Certificate of Public Convenience and Necessity.

Mr. Hewitt: I didn’t understand the Court. I thought you meant our petition for certificate.

The Court: I don’t think that is actually in the record. I think references have been made to it in the course of discussion in or out of court. But I don’t think it is in the record. But if you’d like to put it into the record——

Mr. Hewitt: Yes.

Mr. Anthony: If the Court please, I object to have anything in the record. If we want to have a jurisdictional argument, let’s have it. We are not putting in evidence here.

The Court: Well, this relates to jurisdiction?

Mr. Hewitt: It certainly does.

Mr. Anthony: I don't see that it is proper at all that [148] anything should be read into this record other than conduct this argument on the jurisdictional question.

The Court: I think it relates to jurisdiction. Rather than reading it into the record, I think you had better supply it to the Clerk.

Mr. Hewitt: All right. I'd like to read portions of it. I won't read all of it.

The Court: You may.

Mr. Hewitt: Paragraph 2—I'd like to submit it as an exhibit, your Honor.

The Court: You may.

Mr. Hewitt: Exhibit 1.

The Court: Subject to your objection.

The Clerk: Defendant's Exhibit 1.

(The document referred to was received in evidence as "Defendant's Exhibit 1.")

The Court: It is an exhibit relating to this motion?

Mr. Hewitt: That is correct, your Honor.

The Court: I am going to receive it over Mr. Anthony's objection, and he may have an exception. All right.

Mr. Hewitt: Very well. Paragraph 2 states as follows:

"That Trans-Pacific Airlines, Ltd., applicant above named, is a corporation incorporated under the laws of the Territory of Hawaii and

is an air carrier within the meaning of the Civil Aeronautics Act of 1938 as [149] amended and is now and since January 1, 1947, has been continuously engaged in air transportation carrying persons and property between points within the Territory of Hawaii by air as a common carrier without having a certificate of public convenience and necessity from the Civil Aeronautics Board; that said applicant since January 1, 1947, to the date hereof has conducted and is now conducting a regularly scheduled air carrier service between points within the Territory of Hawaii in violation of the Civil Aeronautics Act of 1938, and in violation of the Economic Regulations, Part 292, issued by the Civil Aeronautics Board."

I want to call the Court's attention to the fact that paragraph 2 of the Petition to Intervene is practically identical with paragraph 3 of the Complaint:

"Defendant, Trans-Pacific Airlines, Ltd., is an air carrier within the meaning of the Civil Aeronautics Act of 1938 as amended and is now engaged in air transportation carrying persons and property between points within the Territory of Hawaii by air as a common carrier and since January 1, 1947, has continuously engaged in such transportation without having a certificate of public convenience and necessity from the Civil Aeronautics Board required under Section 401 of the Civil Aeronautics Act of 1938 as amended." [150]

In the Petition to Intervene they also brought in the fact that we are violating Economic Regulations 292.

The Court: Isn't the purpose for which the same thing may have been said of importance and of significance? In other words, what you may be charged with doing may be a violation of the law and also may be for different purposes a ground for denying a Certificate of Public Convenience and Necessity.

Mr. Hewitt: That's right, your Honor, but under Economic Regulations 285.14 it doesn't make any difference whether it is an informal complaint or a formal complaint or anything else. If this isn't a complaint, I don't know what it is. It is not a proper cause for intervention by any manner or means. It is a complaint.

The Court: Was it granted?

Mr. Hewitt: I imagine it was granted. (To Mr. Lear) Do you know whether it was?

Mr. Anthony: There has been no action taken. It was filed after the filing of this suit.

The Court: It was filed after the filing——

Mr. Anthony: After the filing of this suit. And it was just so that we could be made a party and be served with papers in the pending application.

The Court: Does this exhibit show that? [151]

Mr. Anthony: If he puts it in evidence, it will show that.

The Court: It has been received.

Mr. Hewitt: It was filed, your Honor, prior to the hearing on the Preliminary Injunction.

The Court: Well, that is not particularly important.

Mr. Hewitt: I consider it a complaint. I don't believe, in fact, I didn't know it had been filed. If I had, I would have stressed the point that it had been filed before that hearing. And I think it has a very distinct bearing on this cause because the matter is definitely before the Civil Aeronautics Board. It has an additional ground which I would like to submit to the Court, that this Court does not have jurisdiction, and there are many cases, some of which I cited on the matter.

The Court: Well, I stated at the time of my original ruling that had there been an administrative issue identical to this pending, I would not have acted.

Mr. Hewitt: That is correct, your Honor. And I believe that this is a complaint if I have ever seen one.

The Court: Let me see it. (Document referred to handed to the Court.) This exhibit, however, shows nothing as to when it was filed.

Mr. Anthony: It shows a certificate of service, your Honor, which is a prerequisite under the rules, of September 5th. [152] That means some time after September 5th it reached the C.A.B.

Mr. Hewitt: It was actually filed, mailed about the 5th of September, is that correct?

Mr. Anthony: That's what the certificate says.

The Court: What is the date of this case?

Mr. Anthony: September 3rd, your Honor.

The Court: September 3rd?

Mr. Hewitt: Also at the time of the hearing the question came up and I made the statement that I did not know whether or not there had been any complaint made. In fact, I made the statement, as far as I know there was not.

The Court: That's right.

Mr. Hewitt: So I was quite surprised to see petitioner intervene disguised as a complaint. I considered it as a complaint and I want the record to so show.

The Court: But even as of this moment, regardless of what it may be, you do not know, or either of you, as to whether that has been granted?

Mr. Hewitt: No, I do not know that.

Mr. Anthony: No, we have not been advised.

Mr. Hewitt: I have not been advised whether it's been granted or not. In closing, I would like to make this last statement, that Section 401 of the Civil Aeronautics Act of 1938, as amended, makes no reference to scheduled airlines [153] or non-scheduled airlines. It states that you can't operate an air transportation system without a Certificate of Public Convenience and Necessity.

In turning to Section 416, already cited in this case, we find that the Civil Aeronautics Board has the right to exempt from Section 401 any air carrier or class of air carriers. We submit, your Honor, that this air carrier has in fact been exempt under Section 401. We also submit, your Honor, that the complaint of the Plaintiff does not charge a violation of Section 401. His allegation in paragraph 4 states a violation of the Civil Aeronautics Act of 1938.

We submit also, your Honor, that we have engaged in air transportation as an air carrier and common carrier, if you please, under an exemption issued under Section 416. We also state that Plaintiff's complaint, paragraph 3, says that we have to have a Certificate of Public Convenience and Necessity. We submit that is not the fact.

We also, your Honor, state that the Court does not have jurisdiction, primary jurisdiction, to determine whether or not there has been a violation of an Economic Regulation of the Civil Aeronautics Board. That is entirely within the province of the Civil Aeronautics Board, and we submit the Court does not have jurisdiction.

We move that this Complaint be dismissed and that the [154] Temporary Injunction be vacated herewith.

Mr. Anthony: Does your Honor care to hear from me?

The Court: If you wish to be heard.

Mr. Anthony: I will be very brief, your Honor. This is a rehash of what we have on the application for a preliminary Injunction. The main fact of the matter is this, your Honor, Section 401 of the Act prohibits any person engaging in air transportation without a Certificate of Convenience and Necessity. Now, we contend that the allegation here is that this Defendant has been conducting a regularly scheduled air line as a common carrier, as defined in Section 401 of the Act, and that therefore its operations may be enjoined pursuant to the expressed command of Congress in Section 1007,

giving this Court jurisdiction at the instance of the Board or any party in interest to enjoin a violation of Section 401(a) of the Act.

Now, what my friend on the other side is saying is this: It is true that we hold no certificate under 401(a) of the Act, but, says he, we are exempt under Section 416. And when he goes to Section 416 he discovers that there is an Economic Regulation 292.1 which says that certain irregular air carriers, as defined in that regulation, are exempt from 401(a). In other words, as a matter of defense, in order to resist the charge that he is in violation of Section 401, he looks to the exemption contained in 416 [155] and says that we are exempt under 416.

Now, obviously, if they were doing what they are permitted to do under Section 416 and Economic Regulation 292.1, we would never have filed this suit. It is for the very reason that they are not operating in accordance with Section 401 that we brought this suit to enjoin their operation. Now, they can't come in here and say, we assert as an affirmative defense that we are exempt. And, incidentally, there is no evidence before the Court that they are exempt, because we are an irregular air carrier and we are obeying the regulations. And again there is no evidence of that.

The Court: Well, just a minute. There is in the record evidence that they do hold a certificate as a non-scheduled air carrier.

Mr. Anthony: They hold no certificate, your Honor. They hold a letter of registration.

The Court: Whatever you call it.

Mr. Anthony: As a non-scheduled air carrier. Of course, that letter of registration does not permit them to operate in violation of Section 401.

Mr. Hewitt: Your Honor, that is not the issue as to what it permits us to do.

Mr. Anthony: If I may conclude without any further interruption, I will appreciate it.

The Court: Proceed. [156]

Mr. Anthony: The section under which that certificate is issued, namely, the letter of registration, is in pursuance of Section 416, which says that certain classes of carriers may be exempt from 401. They go from that Section 416 to discover whether or not the Board has done anything in pursuance of that section. And then they say, Yes, the Board has adopted 292.1 applicable to irregular air carriers, i.e., those not operating under or on a regularly scheduled basis as defined in the regulation. Then their argument is a complete non sequitur from there on. And it is this: Because we are denominated as an irregular air carrier under Economic Regulation 292.1. Notwithstanding the fact that we are a regular and a scheduled air carrier, that therefore we are not in violation of 401. And that is a complete non sequitur. The Court has jurisdiction. The Act of Congress expressly grants the Court jurisdiction. And the administrative interpretation of the Board itself concurs in our position.

The Court: Do you wish to be heard?

Mr. Towse: No, your Honor, not upon this point.

The Court: Mr. Hewitt?

Mr. Hewitt: Well, I have very little to say regarding it, your Honor, except that his statement as to interpreting 292.1 again I object to it on the ground that the interpretation of operations under 292.1 rests with the Civil Aeronautics Board. [157] That is the regulation.

The Court: Except perhaps as it may be drawn into the issue indirectly and pursue under 401.

Mr. Hewitt: It certainly does. And we admit earlier, if a determination had been made in fact by the Board that there had been a violation, and the Court should enforce that; or where there is a *prima facie* case where there is no exemption of any kind, because, after all, 401 doesn't say anything about scheduled, non-scheduled or anything else.

The Court: It does talk about common carriers.

Mr. Hewitt: It certainly does. And we admit that they are a common carrier.

The Court: You do?

Mr. Hewitt: Of course, we do. It states so in 292.1. There has never been any doubt about that. We have a right to hold out to the public that we will carry them. And we also have a right to hold out to the public that we will carry them under certain conditions. Now, those conditions are determinable facts under 292.1. There has never been any doubt about that. And I don't think there is any now. That is the difference between this case and the case in the Alaska case.

The Court: In other words, your position is that you are an air carrier and as such a common carrier

holding not a [158] Certificate of Public Convenience and Necessity but a letter of registration as an irregular scheduled airline?

Mr. Hewitt: Not exactly that way. We hold an exemption exempting us from compliance with Section 401. The exemption which we hold is an Economic Regulation under Economic Regulations 292.1. Now, as to the interpretation of operations, again I want to state that 401 doesn't say anything about what type of operations. It just says air transportation. So we can't interpret under 401 anything pertaining to Section 292.1. That is within the jurisdiction primarily of the Civil Aeronautics Board.

The Court: Well, how can you be a common carrier and operate on an irregular basis?

Mr. Hewitt: You can. You can hold out to the public that you will carry them under certain circumstances. There is no question about it. The definition of a common carrier has been very clear. In fact, the brief that was filed is 90 per cent on whether you are a common carrier or not. Mr. Lear states that they wouldn't issue a letter of registration under 292.1 unless we are a common carrier. So I think we are. We admit that we are a common carrier. I don't think there is any doubt about it. And as a common carrier we are exempt under 401. And anything pertaining to our operations which is not alleged in the Complaint—any part of the allegations pertaining to scheduled or non-scheduled in [159] connection with 401 is error and I don't believe is properly pleaded. We are

exempt under 401(a) by virtue of our letter of registration. We are a common carrier, and I don't believe that the Court can interpret 292.1 of Economic Regulations.

That's all I have, your Honor. I'd like to ask the Court for a short recess.

The Court: I will state my ruling on this and then we can take a recess. It seems to me the situation is exactly the same as that which was considered by the Court in relation to the motion for a Preliminary Injunction. True, it has been perhaps more fully argued at this time, but I see no difference in the situation other than this exhibit under the motion labeled—what is it?

The Clerk: No. 1.

The Court: For the purposes of the motion, No. 1, namely, this petition by Hawaiian Airlines to intervene before the Board in the Defendant's pending petition for a Certificate of Convenience and Necessity. For, as I said heretofore, had there been exactly the same issue pending before the Administrative Board, this Court would be reluctant to act until the administrative remedy was exhausted. But I was advised then that there was no such then pending before the C.A.B., and I do not think that this Exhibit 1 constitutes a matter pending, involving the same precise, [160] identical issue for two reasons: One, there is nothing to show that it was acted upon or has been acted upon; it was filed with the C.A.B. after this case was instituted, after this Court took jurisdiction; and quite regardless though it may possibly be a mouthing of the

same points of view as are directly involved here, definitely certain things may be said for one purpose and also for another. And it does appear that the Petition to Intervene before the Board in T.P.A.'s pending application for a Certificate of Convenience and Necessity is, one, taken in the desire to preclude the Board from granting or to persuade the Board from granting to the T.P.A. a Certificate of Convenience and Necessity. As I heretofore said, that is not the issue in this case. This Court is in no wise concerned as to whether there should be one, two, twenty or forty common carriers in this Territory. That is exclusively a matter for the Civil Aeronautics Board to determine.

My only concern here is, under the statute, whether or not until such a time as a Certificate of Convenience and Necessity has been issued properly by the C.A.B. a person such as the Defendant may operate in a manner as alleged here as if it had such a Certificate of Convenience and Necessity. And that is the issue we are going to try this morning.

So my ruling on the point of jurisdiction is adhered to, [161] and you may have additional exceptions if you so desire. It is not necessary, but perhaps you will feel better if you take them.

Mr. Hewitt: I would like to have the record show, your Honor, that exceptions were taken.

The Court: The record may so show. And we will take a brief recess and then start the trial.

(A short recess was taken at 10:55 a.m.)

After Recess

The Court: Are the parties ready?

Mr. Hewitt: Your Honor, in order to clarify the issues here, are we being charged with a violation of 401(a) of the Civil Aeronautics Act of 1938?

The Court: That is my understanding of the allegation.

Mr. Hewitt: The Complaint doesn't show that, your Honor.

The Court: Well, it is only 401(a) as to which this Court has jurisdiction.

Mr. Hewitt: If that is the issue, that's all I wish to know, your Honor. Also, if there is any additional charge here, I'd like to know what the charge or charges are. I don't mind them here at all, but I just want to clarify the issues.

The Court: It is my present understanding.

Mr. Anthony: The Complaint speaks for itself, and Counsel can read it. [162]

* * * * *

Mr. Anthony: We rest, your Honor.

The Court: Very well.

The Court: Does the defense wish to make an opening statement?

Mr. Hewitt: No, your Honor. The defense, however, would like to make a motion at this time under rule 41(b), of the Federal Rules of Civil Procedure, that this complaint be dismissed on the general grounds that upon the facts and the law the Plaintiff has shown no right to relief.

The Court: In other words, you are asking under that rule for an involuntary dismissal?

Mr. Hewitt: That is correct.

The Court: I have heard your motion. On what do you base it?

Mr. Hewitt: Under the rule it is not required to make specific grounds before the Court. The rule specifically states, your Honor, which I call your attention to, that it can be made on general grounds. It is not required that it be specific. If the Court requests, why I will be very glad to be specific on the matter.

The Court: Well, regardless of what the rule says, I don't do business that way. You have got to tell me what you have in mind. [586]

Mr. Hewitt: In the first place, the facts as presented by the Plaintiff have not proved that this Defendant is operating a scheduled airline. The law is uncertain. The allegations of the complaint and the facts presented as evidence in this case have not been tied in. They have been conflicting. There has been considerable evidence, your Honor, which has no bearing on the issues involved, which are merely this, as to whether or not the Defendant is violating section 401(a) of the Civil Aeronautics Act of 1938 as amended. There has been no proof that the Defendant has violated it. The Defendant has plaintiff's testimony in that the so-called flights of the Defendant have been shown by testimony to have been charter or contract flights to Pacific Travel Bureau from January 1st until approximately April. Subsequent to that time the flights of the Defendant may or may not have been contract or charter flights.

There has been no showing by this Plaintiff as to what type of flights they were. There has been no showing that this Defendant has in fact operated a scheduled airlines such as is operated by scheduled airlines who have been certified by the Civil Aeronautics Board, and actually have in possession and in force a Certificate of Public Convenience and Necessity.

A Certified airline must fly the schedules as published. They must fly the schedules regardless of whether or not they [587] have passengers. They also have to file their schedules with the Civil Aeronautics Board, none of which is required of this Defendant.

The testimony clearly brought out by the Plaintiff in using Defendant's witnesses, adverse witnesses, shows that the Defendants may and had in fact cancelled many flights because they did not have a load. There is no compunction or compulsion on this Defendant to fly at any time. They can fly when, as and if they desire. That is not a scheduled operation. A scheduled operation is one that is being flown at all times under the direct supervision of the Civil Aeronautics Board as to the economic factor involved, none of which has been proved by this plaintiff.

So far as the law itself is concerned, you Honor, we have questioned the jurisdiction. We still question the jurisdictional matter. We feel that this Plaintiff's duty was to go to the Civil Aeronautics Board. We feel that this is a complex problem. We feel that the Plaintiff, if he has done anything at

all, and it is doubtful in my mind, has shown that our operations may or may not be in violation of section 292.1 of the economic regulations of the Civil Aeronautics Board. The question before the Court is not a violation of the economic regulations, of 292.1. It is simply as to whether or not we have violated section 401(a). [588]

The Plaintiff's complaint, as alleged in paragraph four, states that we have violated the Civil Aeronautics Act. It doesn't say we violated section 401(a) at any time.

I feel as though the law in the matter as to primary jurisdiction should also be forceably brought out in this case. The Supreme Court has ruled many many times. The cases are abundant on the matter, but where the problem is complex, where the administrative body has in fact taken jurisdiction, that a District Court shall not then take jurisdiction to determine the matter.

I wish also to point out to the Court that again I would like to stress this point, that the jurisdiction of problem as set out in section 1007 of the Civil Aeronautics Act of 1938 as amended states that the District Court shall have jurisdiction in case of a violation. It doesn't say the Court shall have jurisdiction to determine the violation. It was not the intention of Congress that the Courts would determine them, what a violation was in accordance with some rule not involving the actual practice of the particular case before the Court.

This Plaintiff has tried to prove, which I do not think he has proved, that we have violated section

401(a). We do not believe that that is a case properly before this Court. We feel that section 401(a) calls for a violation. If in fact a violation has been determined by the Board, the Courts may then [589] enforce compliance with any order that may have been issued by the Civil Aeronautics Board. Or in another case, if in fact there is a *prima facie* violation, the Courts automatically have jurisdiction. That was the case in Alaska. That is not our case here. I think the evidence has shown that.

Another point I wish to stress with the Honorable Court is simply this: That where a complaint has been filed with an administrative body that has been formed for the sole purpose of administering intricate technical problems such as aviation or types of operation in aviation, that that Board shall take jurisdiction to determine whether or not there has been a violation.

In this particular instance a complaint has in fact been filed with the Board. It was not filed at the time this action was commenced. However, it was filed prior to the hearing on the preliminary injunction. This Defendant received a copy of that so-called petition and a letter from counsel for the Plaintiff; the date on that letter was September 5, 1947.

Now, as to whether or not a complaint has to be a formal complaint or whether or not it has to be informal or just what it is necessary to call the matter is not an important point. Under the economic regulations section 285.14 no type of complaint is required. It is not necessary that it be in any par-

ticular form. It is not necessary that it be formal. Nor is it necessary [590] that it be in fact given to the Civil Aeronautics Board as a complaint. I think the wording of the complaint itself and the wording of the petition to intervene are so identical, which we will show, that the Civil Aeronautics Board has in fact this very matter before them at this time, It is the duty of the Civil Aeronautics Board to determine these matters. And I do not believe, as a matter of law, that this Plaintiff has shown any right to relief in this matter.

I have other grounds, your Honor, but I would prefer, unless your Honor insists, to hold them.

The Court: All right. I appreciate the jurisdictional arguments that you have made. We have been over them before. My ruling on that will be the same. But on this point that you make that certified airlines must file a schedule and fly it, is it your position that one can avoid the necessity of a certificate by not filing a schedule and flying when it pleases and if it pleases?

Mr. Hewitt: Your Honor, a certificate involves many privileges which a non-certificated carrier does not have, such as mail planes and many other things. It is not my contention that an irregular non-scheduled carrier fly a scheduled airline except in this particular point. This Defendant has been exempt from compliance with 401(a). Now, being exempt from section 401(a), just what is the type of operation, if anything, [591] it is a violation of an economic regulation which must be interpreted in light of the facts surrounding the particular operation at the particular time involved.

I do not say, and I certainly don't want the Court to believe, that I mean that a non-certificated air carrier can fly in the same manner as a certificated air carrier. I do not. But he is privileged to fly within certain limitations. He may fly all the contract flights he wishes to fly. He may fly all the charter flights he wishes to fly. He may fly in such a manner. No particular—no trip per day or per week, so long as in fact he hasn't a set, what is called a pattern of regularity.

Now, the evidence before this Court—and again before I make that statement, that is interpreting not section 401(a) or a violation thereof but that is again interpreting the economic regulations, particularly section 292.1. So I say this, your Honor, that there has been no proof by this Plaintiff that this Defendant's flights have not been in accordance with their privilege to fly under section 292.1. If anything, it is an interpretation of the Act and not a question of violation of section 401(a) of the Civil Aeronautics Act of 1938.

The Court: Mr. Anthony?

Mr. Anthony: If the Court please, I shall be very brief. The jurisdictional question I shall not touch on. It has been [592] gone into about four times in this Court. The only other question that he had raised that has not been heretofore passed on by the Court is whether or not the evidence in this case shows that this Defendant is operating as an irregular air carrier. I think it is perfectly clear that the evidence is overwhelming both from their own lips, from their own records, that they have

been operating a scheduled service. They have been operating a scheduled service. They are not an irregular air carrier, which is the limit of their allowable air transportation.

The Court: Just interrupting you there, as I understand Mr. Hewitt, he says at most you may possibly have established that the T. P. A. has operated in violation of economic regulation 292.1 But that may not and is not in his opinion the equivalent of a violation of 401(a).

Mr. Anthony: That is what I was going to proceed to forthwith. In the first place, all air transportation by any air carrier without having a certificate of Public Convenience and Necessity under 401(a) of the Act is prohibited. No question about that. Now, the Defendant comes along and says there is a section in 401(a), rather, section 416 permits the Board to grant certain exemptions as to certain classes of air carriers, which will exempt them from the provisions of section 401. That section says that the authority may from time to time establish just and reasonable classifications for groups of air carriers [593] for the purposes of this title. Now, what he is saying is this: We are required in order to conduct any air transportation to hold a certificate, but we come within an exemption. The exemption is sound in section 416 of the Act and in the regulation 292.1 issued in pursuance of the exemption.

This indeed is the same, it is an analogous argument to what was made when the temporary injunction was argued. Whether or not they are exempt

then rests with this Defendant to show that they are acting under the exemption and they are acting in compliance with 292.1, which would bring them within the limit of the exemption allowed by 416(a). That is our first point.

Irrespective of whether or not that is the legal situation, that as a matter of burden of proof is immaterial because the evidence is conclusive in this case that they are not acting within the exemption and are therefore operating in violation of section 401.

The Court: It is your position that any operation as an air carrier not within the exemption is a violation of 401?

Mr. Anthony: That is correct.

The Court: Whether it is scheduled or not?

Mr. Anthony: It doesn't make a particle of difference. And that is the position of the Civil Aeronautics Board itself.

The Court: You base that on the provision of 401(a) that [594] all air transportation is prohibited unless licensed?

Mr. Anthony: Unless authorized by the Board, that is correct.

The Court: Well, then, the issue in this case is basically whether or not they are operating within their exemption.

Mr. Anthony: Yes, that is correct, your Honor. In other words, or to put it the other way, are they operating in accordance with 401? Certainly there is no provision of either the regulations or the statutes which permits anybody to conduct a regular

scheduled service unless they hold a Certificate of Public Convenience and Necessity. Now, that being so, this Defendant is operating in direct violation of section 401. He admits that he is a common carrier. He admits, as he must, for the purposes of this motion, that there has been a continuous pattern of regularity since January of this year, which is disclosed by the evidence both from their own lips and also from the documentary evidence in this case, the daily schedules, daily schedules, day after day between——

The Court: Well, let me interrupt you right there in relation to that. Mr. Hewitt says that the evidence shows that prior to April the flights, such as they were, were charter flights. Thereafter, the evidence shows, the evidence shows flights but it doesn't show anything as to the nature of those flights, as to whether they were contracts, charter or regular [595] operations.

Mr. Anthony: Well, your Honor, that, of course, has been covered. It's been covered by several decisions of the Board itself. It's been covered and decided by Courts and the I. C. C. repeatedly. I shall deal with that question.

In the first place, using the magic expression "charter" doesn't connote anything unless the terms of the so-called charter are defined. Now, that word "charter" is borrowed from surface transportation. In fact, it is borrowed from motion transportation, surface transportation, and it means where there is a lease of a ship, a steamship owner will charter or demise his ship to a person for a

particular journey. Thereupon the profits and the revenues that inure to the vessel will go to the person holding the charter. Now, we don't have anything like that. In their own answer they admit that they are a common carrier. That automatically disposes of that charter argument. On their own answer they say they are a common carrier. And the testimony is conclusive and undisputed that is the Trans-Pacific Airlines that conducts the air transportation. So by the simple use of a glib expression, as Mr. Hewitt pointed out in one of his questions, you don't know whether these are charter operations or not. And one witness said, no, I don't know. That is certainly no evidence. But more than that, a common carrier cannot escape common carriage [596] by designating on his books or otherwise, or in his advertising, that there is in fact a charter operation. It is a fact, the fact that is essential, and the fact here is that they have been carrying the public generally. They are operating a daily service, at least three of the routes, between at least three of routes that we have evidence on in detail, which parallels the routes of this Plaintiff.

Now, so far as drawing any inference from the testimony and the excuses that Mr. Tongg and maybe some others stated that this is the way they had of getting around the force of the requirement of the certificate, that is absolutely immaterial to any issue here. The fact is that they have actually conducted the carriage. They are a common carrier. They have held themselves out as a common carrier. And the mere fact that on some of their

invoices they pay this mythical travel bureau, purportedly on a so-called hourly basis, is absolutely immaterial, because it is the Defendant that has control and operation, supervision, management of the aircraft. It isn't anybody else. It is the Defendant that conducts the carriage.

Now, the mere fact that they may have by this device set up a different method of compensation between them and the Pacific Travel Bureau is utterly immaterial as to the fact of whether or not they are constituted a common carrier. The authorities are replete on that, your Honor. I don't know [597] whether the Court has had a chance to examine the brief filed by it.

The Court: I have. I am familiar with that.

Mr. Anthony: The brief by the C. A. B. and this Board itself has passed on the same question. When I say this Board, I mean the Civil Aeronautics Board, notably in the Pan Airways case.

The Court: Yes, I understand the significance of the point you raise. It is one we will have to go into perhaps later if this case goes on.

Mr. Anthony: Well, as I was saying, the mere fact that it may be characterized—and that's all it is, a characterization here, there is no proof of a charter, none whatever—the mere fact that it may be characterized as a charter operation is utterly immaterial. The fact of the operation is that they carry the public generally as a common carrier. They follow a regular pattern. They depart at regular hours. They arrive at regular hours. They hold no Certificate of Public Convenience and Necessity

and therefore they are generally in violation of section 401 and they are in no respect in conformity with their so-called exemption. The regulation itself precludes any such notion as an irregular air carrier which this Defendant purports to be operating on a daily service.

Now, what he is saying is that because we don't have a [598] certificate—this is what the argument comes down to—we don't have to file schedules like a certificated air carrier, nor do we have to adhere to schedules like a certificated air carrier. We may have breaks in our schedules and therefore we are not in violation. In other words, they can run a regular service, that is what the argument comes down to, on a regular pattern without a Certificate of Public Convenience and Necessity, and there is no violation of section 401. And this despite the fact that 401 says that no one shall engage in any air transportation unless there is in force a certificate issued by the authorities authorizing such carrier to engage in such air transportation.

The cases that have been decided before have been decided on evidence which is nothing as compared with the overwhelming evidence in this record. There have been several trips that have been repeated over a period of two or three weeks and the Board has found—in air transportation I am talking about—that that is a pattern of regularity. That was the case in the Paige Airways case. It is the case in the Trans-Carribean Air Cargo and in the Trans-Marine Airlines matter. And it was on the

basis of those three decisions that the redraft of the economic regulation number 292.1 was promulgated. And this Court has followed the very standard of irregularity that has been laid down by the Civil Aeronautics Board itself, in those [599] cases. As counsel for the Board say in the brief that is on file here, this Court has been very careful to permit this Defendant to conduct all of the operations, air operations, that it is authorized to operate. And so long as that is all that this Defendant is enjoined from doing, that is, operating in excess of its authority, which excess would be in violation of section 401, this Court not only has jurisdiction but it is the duty of this Court to make the injunction permanent.

Mr. Hewitt: If the Court pleases, I would like to make this statement again. Section 401(a) says that no persons may engage——

The Court: I have it.

Mr. Hewitt: I have to find it myself.

The Court: No air carrier shall engage——

Mr. Hewitt: It says no air carrier shall engage in any transportation unless there is in force a certificate issued by the authority authorizing such air carrier to engage in such transportation. All right. Our contention is, your Honor, that we have been exempt under section 292.1 from section 401(a). In other words, this Board, Civil Aeronautics Board, has in this particular case never determined a violation, not interfered with the operations. They have had all the information regarding the flights. The evidence showed that quarterly reports have been filed. They have been cognizant of the

operation. They know everything there is to know about the operation. We have consistently told them not only in our application before the Board for an expeditious hearing on an application filed in July 1946, but we have personally informed them. I personally informed——

Mr. Anthony: There is no evidence of any of this, your Honor. Can't we confine ourselves to the record?

The Court: That would be better.

Mr. Anthony: I'd like to cross-examine counsel on that, of what he informed the Board.

The Court: That seems to be in point, Mr. Hewitt, but while we have an interruption here, I think I grasp what you are getting at, and let me ask you this. You are correct in contending that under the C. A. B. your Defendant has been exempt under another provision. And it is authorized to operate in accordance with that exemption. But if it exceeds its exemption, its operations go beyond its exemption, and is it your contention that it still is not a violation of 401?

Mr. Hewitt: No, sir. It is not my contention. My contention is that the Board, the Civil Aeronautics Board, should determine whether or not we are violating our exemption. In other words, the Board determines that.

The Court: Well, any air transportation by an air carrier which is either not licensed under 401 or not exempt under 416 [601] is a violation of 401 as to which this Court has jurisdiction—right?

Mr. Hewitt: No, sir. I do not agree. I will put it another way. If an air carrier is in fact exempt under 401 by some provisions of exemption within section 416, then the extent of the operations of that air carrier shall be determined from then on by the Civil Aeronautics Board, so far as the scope of those operations are concerned. And the reason for that is that this Court must interpret 292.1. They are not interpreting 401(a) because that is out of the picture now. This particular defendant has been exempt from 401(a). They have an exemption. They have a letter of registration which I am sure you are familiar with. It was brought out in the preliminary injunction. That being the case, whatever jurisdiction this Court takes is determining operations under a regulation, 292.1. And if the Court can determine and interpret a regulation such as 292.1, they certainly can determine them all, all the regulations. And I don't think that would be the intention of the law.

The Court: Well, there is no law against the judicial branch interpreting administrative regulations, is there? They are not so holy and sanctified that they can't be inspected and measured by the judicial branch of the government.

Mr. Hewitt: Your Honor, I think I have not made myself [602] clear. I say this, I don't say the Court hasn't the intelligence and the ability. I don't say that at all. I say it is a matter of law, not my idea of the law but what the Supreme Court says about the law, that this Court shall not take jurisdiction when an administrative body has already accepted jurisdiction.

When that letter of exemption was issued, the Civil Aeronautics Board thereafter has taken jurisdiction over the operations of this defendant. I don't say that it is impossible for this Court to do anything. I am talking strictly legally and the administrative law is very clear on the point.

Now, counsel refers to the brief, the Civil Aeronautics Board's brief. We have that brief and it skipped very lightly over the administrative problem. In fact, they just make a blunt statement that under section 1007 of the Civil Aeronautics Act the Court has jurisdiction, period. They don't talk anything about administrative law, primary jurisdiction. And I think it is a very important point. We have gone over it several times before, true, but nevertheless it is a vital point in this particular case.

The Court: Well, assuming for a moment that you are right, it is still a fact, isn't it, that Congress has made a specific provision in this C.A.B. law that violations of 401(a) may at the instance of the Board or an injured party be considered in a judicial proceeding? Now, if you are right that by issuing [603] this letter of registration exempting your client, the Board has thus taken jurisdiction of the issue for all purposes, do you mean to say that it would therefore follow that never could the matter be tested judicially as to whether or not that exemption is being violated and that the Board or the injured party could never have any recourse to the courts, assuming, for example, that the C.A.B., as might possibly appear in this instance, has sat idly by and done nothing, must an injured party also——

Mr. Hewitt: Your Honor, if the Board determines in fact, not as a matter of law but as a matter of fact, that there has been a violation after they have taken jurisdiction of the matter, then the Courts come into the picture and they certainly have the right to enforce.

The Court: But supposing the C.A.B. does nothing?

Mr. Hewitt: Well, whether or not the C.A.B. does nothing or not is I don't think material.

The Court: Well, it is certainly material to an injured party as a legal proposition. Under your construction, because of this exemption and C.A.B., on your theory having taken jurisdiction, it has thus acquired exclusive jurisdiction, but supposing it declined through either negligence or inadvertence or some other reason to act, must an injured party wait until such a time when, as, and if the C.A.B. decides to do something? [604] Or they can do, as Congress allowed them to do, and come into Court.

Mr. Hewitt: I think your Honor is correct. I think that is perfectly true. But I think the plaintiff must first show that he has exhausted his administrative remedy. There is no allegation in this complaint that he has done anything as far as the Civil Aeronautics Board is concerned. He hasn't tried it.

The Court: That is right, and we have been over that point.

Mr. Hewitt: And the law is very clear. The plaintiff should exhaust his remedies, and he has to make an allegation to that effect.

The Court: Well, I don't agree with you on that particular point. However, I would not have entertained this case if there was pending a square complaint based on this issue before the C.A.B. But your point on that is that this motion to intervene in connection with your petition for a certain amount to a complaint pending before an administrative board——

Mr. Hewitt: Well, it is, your Honor.

The Court: Well, I have heard you on that before and I am not going to change my mind. I think a statement may be made for one or two purposes, and it is very important for the purpose for which it is made. Apparently they have made a [605] statement based on facts similar to those alleged here. In connection with your pending application, for the purpose of blocking your application. Now, if they may possibly use the same facts for another purpose, which apparently they are doing here, namely, to procure an injunction, I don't agree with you that there is this issue now pending administratively before the C.A.B., and even if it was, this Court had taken jurisdiction first.

Mr. Hewitt: That is true, your Honor, but whenever there is any question of jurisdiction, either on the part of the Court itself or any suggestion as to jurisdiction, the Court has the right and the power to hear that jurisdiction.

The Court: Oh, yes.

Mr. Hewitt: To hear that.

The Court: Excuse me. But the C.A.B. will not oust a Court of jurisdiction, first, a Court of jurisdiction taking first——

Mr. Hewitt: But the power and discretion of the Court in determining that fact is very important. In other words, if I can show to this Court that, as a matter of fact, there has been a complaint made to the Civil Aeronautics Board prior to the hearing.

The Court: And you may have something if you do that.

Mr. Hewitt: Well, that is exactly what happened.

The Court: Well, there is no evidence here.

Mr. Hewitt: I don't know it.

The Court: At the moment, as things stand, there is no evidence of that.

Mr. Hewitt: No, your Honor, that is true.

The Court: All right. We will confine ourselves to what is before us.

Mr. Hewitt: Although it was before the Court on my motion on jurisdiction.

The Court: Well, I don't know. I have the impression you are talking about something different than that which I have heard. But it may be that you are still including this intervention thing in the way which I have always contended and concerning which I disagree. I am going to overrule your motion and you may have an exception. Before you start, we have almost consumed an hour arguing. Would you like a short recess to prepare?

Mr. Hewitt: Yes. Thank you.

(A short recess was taken at 10:55 a.m.)

After Recess

The Court: Now, you are ready and you do not wish to make an opening statement? If not, you may call your first witness.

Mr. Hewitt: No. Mr. Tongg, will you take the stand, please? [607]

* * * * *

(Mr. Hewitt summed up on behalf of Trans-Pacific Airlines, Limited.)

(A short recess was taken at 11:00 a.m.)

After Recess

(Mr. Anthony summed up in behalf of the Hawaiian Airlines, Limited.)

The Court: Yesterday when we discussed the hotly contested issue of whether there would be no oral argument but simply briefs filed, the Court ruled that we would have an oral argument and at the end of that oral argument if the Court saw fit to ask for briefs, feeling that it might at that time decide that it needed briefs, it would announce that fact, and if it needed briefs allow the parties to file the same.

Having heard the arguments presented by both counsel, I am satisfied that the issue is as concise and as clear as it was when the case first started, and that there are no briefs required by the Court for its assistance.

I am going at this time to announce my ruling and I will later reduce it to writing.

Upon a consideration of the points of law involved, as to which I have previously indicated I disagreed with Mr. Hewitt and Mr. Lear, I am satisfied that this Court has jurisdiction. [1137] I am secondly satisfied, from consideration of the documentary and other evidence in this case given by witnesses, that this defendant has operated in violation of Economic Regulation 292.1. And thirdly, I am satisfied that in so far as damages are concerned that an equitable basis exists here for the issuance of an injunction of a type prayed for in that the remedy at law is inadequate and that it is not necessary in a case of this sort to establish dollars and cents damage.

In particular I am satisfied in point of law that a franchise holder, limited though that franchise may be, is entitled to injunctive relief when exposed to unlawful competition to the damage and injury of the franchise which it holds. That is the case here. The Hawaiian Airlines holds a limited franchise issued to it by the Civil Aeronautics Board pursuant to an Act of Congress.

The evidence here discloses that this defendant is operating in violation and in excess of the permission heretofore granted to it by the Civil Aeronautics Board, and as to that excess operation over and beyond Economic Regulation 292.1. It is not covered by a certificate under Section 401(a) of the Act. That being so, working backwards in this discussion, the Court has jurisdiction under the Civil Aeronautics Act to grant the relief prayed for, and it will do so in substantially the same form

as a preliminary injunction took; that is, reserving the right to the defendant to increase its operation to the extent that the C.A.B. changes its mind from time to time, or it obtains a full certificate from the Civil Aeronautics Board. [1139]

* * * * *

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO TRANSCRIPT OF RECORD
ON APPEAL

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing pages numbered 1 to 1142, inclusive, are a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and that the costs of the foregoing transcript of record are \$19.90 and that said amount has been paid to me by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 17th day of February, 1948.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court, District of Hawaii.

DEFENDANT'S EXHIBIT "A"

Civil Aeronautics Board

Washington 25

Letter of Registration No. 163

Non-Certificated Irregular Air Carrier

Trans-Pacific Airlines, Ltd.

P. O. Box 2113

Honolulu, T. H.

is hereby acknowledged to have duly registered with the Civil Aeronautics Board as a Non-Certificated Irregular Air Carrier under the provisions of section 292.1 of the Economic Regulations, as amended, relating to irregular interstate and overseas air transportation of persons and property and irregular foreign air transportation of property only.

This letter of Registration is not transferable and may be suspended or revoked at any time in accordance with pertinent provisions of section 292.1 of the Economic Regulations, as amended.

This is not a certificate of public convenience and necessity and is merely evidence of registration.

Issued: July 8, 1947.

[Seal] /s/ M. C. MULLIGAN,
Secretary.

DEFENDANT'S EXHIBIT "C"

Docket No. 2390

Before the Civil Aeronautics Board

In the Matter of the Application of

TRANS-PACIFIC AIRLINES, LTD., Under Section 401 of the Civil Aeronautics Act of 1938, as Amended, for a Certificate of Public Convenience and Necessity Authorizing Air Transportation of Persons, Mail and Property on a Scheduled Basis Between the Terminal Point Honolulu, T. H., Intermediate Points Hilo and Upolu, Island of Hawaii, Puunene Field, Island of Maui; Lanai, Island of Lanai; Homestead Field, Island of Molokai; Port Allen, Island of Kauai, and Barking Sands, Island of Kauai.

PETITION TO INTERVENE

Communications with respect to this Petition should be sent to:

Stanley C. Kennedy, President
Hawaiian Airlines, Limited
Inter-Island Building
Honolulu 1, Hawaii

J. Garner Anthony
Robertson, Castle & Anthony
312 Castle & Cooke Building
Honolulu 1, Hawaii
Counsel for Petitioner

[Title of Board.]

PETITION FOR INTERVENTION

Hawaiian Airlines, Limited, a corporation incorporated under the laws of the Territory of Hawaii, petitioner herein, requests leave to intervene as a party in the above proceedings pursuant to Economic Regulations, Part 285, Rules of Practice, Section 285.6, Civil Aeronautics Board, and alleges:

1.

That petitioner is the holder of a certificate of public convenience and necessity issued to it pursuant to Section 401 of the Civil Aeronautics Act of 1938, 49 U.S.C. Sec. 481, authorizing it to engage in the transportation of persons, property and mail between points within the Territory of Hawaii and since the issuance of said certificate on June 16, 1939, has continuously engaged in air transportation as an air carrier pursuant to said act.

2.

That Trans-Pacific Airlines, Ltd., applicant above named, is a corporation incorporated under the laws of the Territory of Hawaii and is an air carrier within the meaning of the Civil Aeronautics Act of 1938 as amended and is now and since January 1, 1947, has been continuously engaged in air transportation carrying persons and property between points within the Territory of Hawaii by air as a common carrier without having a certificate of public convenience and necessity from the Civil Aero-

navitics Board; that said applicant since January 1, 1947, to the date hereof has conducted and is now conducting a regularly scheduled air carrier service between points within the Territory of Hawaii in violation of the Civil Aeronautics Act of 1938, and in violation of the Economic Regulations, Part 292, issued by the Civil Aeronautics Board.

3.

That applicant's regularly scheduled service substantially parallels the service furnished by petitioner pursuant to its certificate; that petitioner has an interest in the proceedings as the certificated air carrier operating the route applied for by applicant and that the protection of petitioner as a certificated air carrier against unregulated competition make it in the public interest that petitioner be allowed to intervene as a party in the above proceedings; that no other parties have appeared in the above proceedings and petitioner has a property and financial interest in said proceedings which would not be represented by the existing parties.

Wherefore, petitioner prays that it be allowed to intervene as a party in the above proceedings.

Dated: Honolulu, Hawaii, September 4th, 1947.

HAWAIIAN AIRLINES,
LIMITED,

By /s/ STANLEY C. KENNEDY,
Its President.

Territory of Hawaii,
City and County of Honolulu—ss.

Stanley C. Kennedy, being first duly sworn under oath, deposes and says:

That he is the president of Hawaiian Airlines, Limited, petitioner above named; that he has read the foregoing petition, knows the contents thereof and that the same is true and that he intends and desires in granting the relief requested that the Board shall place full and complete reliance upon the accuracy of each and every statement therein set forth; that to the best of his information and belief every statement contained in the instrument is true and no such statement is misleading.

/s/ STANLEY C. KENNEDY.

Subscribed and sworn to before me this 4th day of September, 1947.

/s/ DAVID L. PETERSON,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1949.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition upon all parties who appear of record in Docket 2390.

Dated: Honolulu, Hawaii, September 5, 1947.

/s/ J. GARNER ANTHONY,
Counsel for Hawaiian Air-
lines, Limited.

[Endorsed]: No. 11865. United States Circuit Court of Appeals for the Ninth Circuit. Trans-Pacific Airlines, Ltd., a corporation, appellant, vs. Hawaiian Airlines, Limited, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed February 24, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth District

No. 11865

HAWAIIAN AIRLINES, LIMITED,
Plaintiff,

vs.

TRANS-PACIFIC AIRLINES, LTD.,
Defendant and Third Party Plaintiff,

vs.

INTER-ISLAND STEAM NAVIGATION COM-
PANY, LIMITED,
Third Party Defendant.

STATEMENT OF POINTS PURSUANT TO
RULE 75(d), FEDERAL RULES OF CIVIL
PROCEDURE

Now comes Trans-Pacific Airlines, Ltd., appellant herein, and pursuant to Rule 75(d) of the Federal Rules of Civil Procedure, sets forth a statement of points on which appellant intends to rely on appeal, as follows, to wit:

Point I.

That the United States District Court for the Territory of Hawaii had no jurisdiction of appellant.

Point II.

That at no time during the course of said proceedings did appellant submit to the jurisdiction of

said Court, but at all times appellant seasonably objected to the asserted jurisdiction of said Court.

Point III.

That appellant did not at any time waive its objection to said jurisdiction of said court.

Point IV.

That the ruling that the United States District Court for the Territory of Hawaii had jurisdiction over appellant and order of the United States District Judge affirming said jurisdiction, and the issuance of a Writ of Injunction therein was error.

Wherefore, appellant prays that the decree of said Court be reversed.

Dated: April 8, 1948.

TRANS-PACIFIC AIRLINES,
LIMITED,

By /s/ FREDERICK L. HEWITT,
Its Attorney.

[Endorsed]: Filed April 9, 1948.

No. 11,865

IN THE
United States Court of Appeals
For the Ninth Circuit

TRANS-PACIFIC AIRLINES, LIMITED
(a corporation),

Appellant,

vs.

HAWAIIAN AIRLINES, LIMITED
(a corporation),

Appellee.

Upon Appeal from the District Court of the United States
for the Territory of Hawaii.

APPELLANT'S OPENING BRIEF.

SAI CHOW DOO,
FREDERICK L. HEWITT,
COATES LEAR,
68 Post Street, San Francisco 4, California,
Attorneys for Appellant.

BLAIR AND BLAIR,
Washington, D. C.,
FONG, MIHO & CHOY,
Honolulu, T. H.,
Of Counsel.

FILED

SEP 14 1948

PAUL P. O'BRIEN,

CLERK

Subject Index

	Page
Statement of Jurisdiction.....	1
Introductory statement of facts.....	2
Appellant's contention	7
Argument	7
Summary	42

Table of Authorities Cited

Cases	Pages
Adler v. Chicago & Southern Air Lines, Inc. (Mo. 1941), 41 Fed. Supp. 366	24
Alaska Air Transport, Inc. v. Alaska Airplane Charter Company, No. 5588-A, District Court, Territory of Alaska, Division One, at Juneau, decided August 20, 1947.....	36
Armour & Co. v. Alton R. Co. (1941), 61 S. Ct. 498, 312 U. S. 195, 85 L. Ed. 771.....	39
Aron v. Pennsylvania R. Co. (CCA-2, 1935), 80 Fed. (2d) 100	36
Brown & Sons Lumber Co. v. Louisville & N. R. Co. (1937), 57 S. Ct. 265, 81 L. Ed. 301, 299 U. S. 393.....	21
Georgia v. Pennsylvania R. Co. (1944), 65 S. Ct. 716, 324 U. S. 439, 89 L. Ed. 1051.....	19
Great Northern R. Co. v. Merchants Elevator Company (1922), 42 S. Ct. 477, 259 U. S. 285, 66 L. Ed. 943.....	13
Matter of the Noncertified Operations of Trans-Caribbean Air Cargo Lines, Inc., Civil Aeronautics Board (Docket 2593), decided March 14, 1947.....	5, 40
Rochester Telephone Corp. v. U. S. (1939), 59 S. Ct. 754, 307 U. S. 125, 83 L. Ed. 1147.....	22
Terminal Warehouse Co. v. Pennsylvania R. Co. (1935), 56 S. Ct. 546, 297 U. S. 500, 80 L. Ed. 827.....	16
Texas and Pacific Railway v. Abilene Cotton Oil Co. (1907), 27 S. Ct. 350, 204 U. S. 426, 51 L. Ed. 553.....	11
United States Navigation Co. v. Cunard S. S. Co. (1932), 52 S. Ct. 247, 284 U. S. 474, 76 L. Ed. 408.....	23

Statutes

Civil Aeronautics Act of 1938, as amended (49 U.S.C.A., Section 481A)	1, 2, 7, 34
Section 205 (49 U.S.C. 425).....	32
Section 401(a) (49 U.S.C. 481(a))... ..	2, 6, 25, 27, 29, 33, 34, 42

	Pages
Section 411 (49 U.S.C. 491).....	31
Section 416 (49 U.S.C. 496).....	25, 27, 29, 33
Section 1002(a) (49 U.S.C. 642).....	7
Section 1002(a-c) (49 U.S.C. 642(a-c)).....	30
Section 1006 (49 U.S.C. 646).....	32
Section 1006(e) (49 U.S.C. 646(e)).....	32
Section 1007 (49 U.S.C. 647(a)).....	3, 34, 35
Section 1007(a) (49 U.S.C. 647(a)).....	33
 Economic Regulations of Civil Aeronautics Board:	
Section 292.1	3, 26, 29, 33, 34, 40
Section 292.1(c)(1)	27
Section 292.1(d)(1)	27
Section 292.1(d)(2)	28
Section 292.1(d)(4)	29
Section 292.1(d)(5)	29
 Federal Rules of Civil Procedure, Rule 12(h).....	 6
 51 Harvard Law Review 1251.....	 8
 Interstate Commerce Acts:	
Federal Communications Act	7, 22
Shipping Act	7, 23
 Judicial Code, Section 128 (28 U.S.C.A., Section 225).....	 2

No. 11,865

IN THE
United States Court of Appeals
For the Ninth Circuit

TRANS-PACIFIC AIRLINES, LIMITED

(a corporation),

Appellant,

vs.

HAWAIIAN AIRLINES, LIMITED

(a corporation),

Appellee.

Upon Appeal from the District Court of the United States
for the Territory of Hawaii.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

Appellant was charged with violating the Civil Aeronautics Act of 1938, as amended (49 U.S.C.A. Sec. 481A) in the United States District Court for the Territory of Hawaii. Writ of permanent injunction was entered in said Court on November 10, 1947. Notice of appeal was properly filed in the District Court for the Territory of Hawaii. Within the time allowed by law as extended by Order of the Court, the transcript of record was filed herein. Jurisdiction of this Court to review the said final judgment

of the District Court is sustained by Sec. 128 of the Judicial Code (28 U.S.C.A. Sec. 225).

INTRODUCTORY STATEMENT AND FACTS.

This appeal is premised upon the single proposition of law that the United States District Court for the District of Hawaii acted in excess of its jurisdiction in entertaining respondent's complaint on file herein and in permitting respondent to proceed. It is appellant's contention that respondent's complaint should have been dismissed. The transcript on file herein shows that appellant seasonably and continuously asserted its objection to the District Court's jurisdiction and to any further proceedings in the matter of such complaint.

The facts pertinent to this appeal are: On September 3, 1947, respondent filed its complaint (Transcript: 2-4) alleging plaintiff and respondent to be the holder of a certificate of public convenience and necessity issued to it pursuant to Section 401 of the Civil Aeronautics Act of 1938 as amended (49 U.S.C. 481) authorizing it to engage in air transportation as an air carrier and that it is so engaged. It then alleges that appellant and defendant is likewise so engaged, except that appellant does not have a certificate of public convenience and necessity. The prayer is for an injunction, both permanent and preliminary.

For such purpose, plaintiff must rely upon the express provisions of the Civil Aeronautics Act, since

its rights are purely statutory and in its complaint expressly relies upon Section 1007 of the Act. (49 U.S.C. 647(a).)

The findings of fact and conclusions of law (Transcript: 13-15) find that plaintiff had such a certificate issued to it on June 19, 1939, and that defendant "is an irregular air carrier having a Letter of Registration issued to it by the Civil Aeronautics Board." The Court further finds that defendant "engaged in air transportation, carrying persons and property between points within the Territory of Hawaii as a common carrier and from January 1, 1947, to September 11, 1947, conducted a regular scheduled daily service as a common carrier between points within the Territory of Hawaii without having a certificate of public convenience and necessity from the Civil Aeronautics Board." But the Court after finding defendant to have been an "irregular air carrier having a Letter of Registration" further finds that during the aforesaid period it "has not operated within the allowable limits of Sec. 292.1 of the Economic Regulations of the Civil Aeronautics Board."

The conclusions of law are thus clearly premised on the purported violation of Sec. 292.1 of the Economic Regulations and that therefore defendant "has not operated under any exemption pursuant to Sec. 416 of the Civil Aeronautics Act of 1938." (49 U.S.C. 496.)

The decree and writ of injunction (Transcript: 15-23) then specifically enjoins appellant from operating

without the limits of the District Court's view and interpretation of the Economic Regulations, stating:

“This injunction will not prohibit operations of defendant in accordance with the exemption granted it by the Civil Aeronautics Board in Economic Regulations, Section 292.1 as amended June 10, 1947, exempting irregular air carriers as authorized by Section 416 of the said Act (49 U.S.C. 496(b)); provided, however, that violation of said regulation and of this injunction shall be determined by the application of the standard of regularity currently adopted by the Civil Aeronautics Board, to wit: the operation of aircraft between points or within the Territory of Hawaii in air transportation of persons and property regularly or with a reasonable degree of regularity, which regularity is reflected by the operation of a single flight per week on the same day of each week between the same two points, or is reflected by the recurrence of operations of two round-trip flights, or flights varying from two to three or more such flights, between any same two points, each week in succeeding (88) weeks, without there intervening irregular but frequent intervals during which no such flights are operated so as thereby to result in appreciable definite breaks in service. It is intended by this decree to require irregularity in service between any such points but not to preclude the operation of more than one or two such flights in any given week, nor to prescribe any special maximum limitation upon the number of flights which may be performed in any one week, if infrequency and irregularity of service is otherwise achieved through variations in number of flights and intervals between flights and through frequent and

extended definite breaks in service. The word 'Point' is herein defined as an airport and all territory in a 25-mile radius;”

The above interpretation is premised upon a decision of the Civil Aeronautics Board in *Matter of the Non-certified Operations of Trans-Caribbean Air Cargo Lines, Inc.* (Docket 2593), decided March 14, 1947.

The decree and writ then contain these very important provisions:

“Leave to apply for a modification of this decree and the writ issued in pursuance hereof is hereby granted either party in the event the Civil Aeronautics Board shall hereafter modify or rescind the aforesaid regulations or its interpretation placed thereon by said agency;

“Jurisdiction of this cause is retained for the purpose of giving full effect to this decree and for the purpose of making such further and other orders and decrees or taking such further action, if any, as may become necessary or appropriate to carry out and enforce this decree.”

Thus by the record on file herein, plaintiff was an air carrier holding a certificate of public convenience and necessity, defendant (and appellant) holds a Letter of Registration as an irregular air carrier (Transcript: Defendant's Exhibit "A": 80), plaintiff sought to enjoin certain operations of defendant, and to reach that result the District Court was compelled to make its own interpretation of a regulation of the Civil Aeronautics Board, after finding that the Board

had issued a Letter of Registration to defendant. This had the effect of exempting defendant and appellant from compliance with Section 401(a) of the Act. (49 U.S.C. 481(a). Thus this action resulted not in essentially being an action to enjoin a violation of Sec. 401(a) of the Act, but, essentially to interpret and define a regulation of the Board, over which the Board could and has exercised full and competent authority, and within its primary jurisdiction, as appellant will hereinafter show.

Appellant continuously insisted that the Civil Aeronautics Board had already complete jurisdiction over it and that it was the province of the Board to interpret its regulations, and to determine the complicated facts essential to a determination of a violation thereof, and that the Board has primary jurisdiction to so do, and until the Board has acted, the District Court is without jurisdiction to do so.

Appellant attacked the jurisdiction of the Court at the time of the hearing on the order to show cause why a preliminary injunction should not issue. (Transcript: Memorandum of Ruling: 10.) The point was seasonably reiterated during the course of the trial as shown by the transcript on file herein. The question of lack of jurisdiction was also raised by appellant under Rule 12(h) of the Federal Rules of Civil Procedure. (Transcript: 30.)

In addition, defendant and appellant had applied to the Board for a certificate of public convenience and necessity (Transcript: Defendant's Exhibit "C":

81) and plaintiff and respondent had one day following the filing of its complaint herein, intervened, and raised the same issues as those raised by its complaint. Thus in further fortification of the primary jurisdiction of the Board, respondent has by its own act, submitted the pertinent issues to the Board, on the basis of a complaint, of which the Board has been given jurisdiction to act by the provisions of Section 1002(a) of the Act. (49 U.S.C. 642.)

APPELLANT'S CONTENTION.

Thus the question on appeal before this Court, and the contention of appellant is that for the very salutary and substantial reasons brought out in appellant's argument and laboriously worked out by the United States Supreme Court in a line of important decisions, the Civil Aeronautics Board had primary jurisdiction of the issues raised by plaintiff's complaint, and the District Court erred in assuming jurisdiction.

ARGUMENT.

Although the question raised by this appeal appears to be novel as applied to the Civil Aeronautics Act of 1938, as amended, and thus of importance in that application, it is by no means novel as applied to the Interstate Commerce Acts, the Federal Communications Act and the Shipping Act. It has been before

the Supreme Court a number of times, and important in the development of the relationship between administrative authority and judicial cognizance.

Having come to be known as the principle of primary jurisdiction, it is admirably stated, and as succinctly as its involvements permit, in 51 *Harvard Law Review* 1251. The Court is best served by a quotation:

“Keystone of the arch of administrative regulation is the ‘primary jurisdiction’ rule. With its requirement that controversies calling for administrative discretion be determined by commissions rather than by courts, following from the formula that these questions are primarily within the jurisdiction of the administrative commission charged with that particular field of regulation, the doctrine of primary jurisdiction has pervaded the entire realm of administrative law. Railroad regulation developed the doctrine, public utility regulation expanded it, tax litigation extended it, and now the rapidly enlarging fields of labor and industrial regulation have adopted it.

“The issue is whether suit may be filed in court or must be brought instead before an administrative commission, when, for example, utility rates are attacked as unreasonable or inapplicable, the denial of certain service is assailed as discriminatory, an assessment is challenged as invalid, or a labor practice is denounced as unlawful. The frequency with which this question arises, particularly in view of the current expansion of administrative regulation, warrants an examination of the scope of the primary jurisdiction rule, for on this rule rests the vital interrelation of courts and commissions.

“One practical generalization is that a remedy created by statute must be pursued according to statutory prescription, whether the prescribed tribunal be court or commission. But the chief development of the primary jurisdiction rule has been in the absence of express statutory provision, or in the face of it; and the major problems arise when the statutory prescription is not clear, a circumstance that necessarily follows from the attempt to apply to a myriad of specific cases a general statute defining administrative jurisdiction.

“The primary jurisdiction of administrative commissions, as invoked by court decisions, has two main branches: (1) exclusive jurisdiction, where the court has no jurisdiction of the subject matter at all, and the commission must decide the question, with judicial review ordinarily only to safeguard the requirements of due process of law, and possible court action to enforce the commission's order; and (2) exhaustion of remedy, where the court has jurisdiction of the subject matter but the suit is premature, and the court refuses to decide the case until all possible administrative determination has been completed.

“Many reasons underlie the courts' enforcement of both aspects of this self-denying doctrine. Expert and continuous study by the administrative agency makes it better qualified than the courts to deal with intricate, technical problems of regulation. *Complaint before a commission may give more adequate relief, because the commission can frame its order to develop future rules and govern allied situations, while the court is concerned primarily with past conduct and is*

necessarily restricted to the facts of the particular case. Uniformity of regulation can be achieved only through administrative determination; otherwise, conflicting decisions of various courts as to the reasonableness of certain rates or practices would lead to the confusion and discrimination that administrative agencies were designed to prevent. Considerations of orderly procedure require that matters within the jurisdiction of the administrative commission be determined by it before courts adjudge the controversy, lest different phases of the same case be pending before the commission and the courts at one time. Moreover, it is a fundamental canon of judicial conduct to avoid interference with legislative or administrative regulation, until it is certain that that regulation imminently threatens to infringe the rights of the petitioner and will not be modified." (Italics supplied.)

Thus, there are several major bases for the principle:

1. Uniformity of regulation;
 - (a) Among different cases, involving different persons, and
 - (b) Among different District Courts, involving the same person.
2. Complexity of facts, best dealt with by the expertness of the commission or board.
3. Flexibility of the administrative action, not possible in judicial proceedings.
4. Avoidance of multiplicity of action.

5. Reluctance to judicially interfere with the administrative functions based on a "division of labor" of governmental burdens.

The leading case is probably *Texas and Pacific Railway v. Abilene Cotton Oil Co.* (1907), 27 S. Ct. 350, 204 U. S. 426, 51 L. Ed. 553. There the Court had before it, a protest of plaintiff based on a charge of the exaction of discriminatory and unreasonable rates. Justice White, who is now recognized as a leader in developing the applicable principles of administrative law, says on page 440 of 204 U. S.:

"This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power

in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.”

Further citations showing the growth and development of the principle will be developed in the course of this argument. Having outlined the *reason* of the

rule there is now another question of fundamental importance not yet referred to. That is: When is the principle applied?

To assert that there are no instances when the courts take cognizance of cases involving commerce would be an obvious absurdity, and, it would be quickly recognized by this learned Court that appellant has not fully analyzed the problem. However, appellant will endeavor to show that the case at bar is one clearly illustrating a typical instance of the application of the rule.

Fundamentally, of course, the rule is applied when the reasons for it require it. However, the Supreme Court has enunciated certain boundary lines for guidance.

In *Great Northern R. Co. v. Merchants Elevator Company* (1922), 42 S. Ct. 477, 259 U. S. 285, 66 L. Ed. 943, a shipper had recovered an alleged overcharge based on a construction of a tariff rule. Justice Brandeis, in not applying the bar to the rule, divided the cases on the basis of whether the question was essentially one of law, and not one of administrative discretion, in which instance the bar of the principle would not apply, or whether it involved fact, or administrative discretion, in which event it would apply. Thus says the learned jurist on page 291 of 259 U. S.:

“Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administra-

tive, in contradistinction to judicial. But, ordinarily, the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule, or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.

“When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of

trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact. Where the controversy over the writing arises in a case which is being tried before a jury, the decision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed if the jury finds that the alleged peculiar meaning or usage is established. But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language,—a question of law,—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them, or that a particular usage existed.”

And in summary on page 294 of 259 U. S.:

“The petition for certiorari was asked for on the ground that the decision of the supreme court

of Minnesota in this case was in conflict with the above decisions of this court, and also that the decisions in several state courts and in the lower Federal courts were in serious conflict on the question involved. In the brief and argument on the merits, it was also asserted that some recent decisions of this court are in conflict with the rule declared and applied in the *American Tie & Timber Co. Case*, *supra*, and the *Loomis Case*, *supra*. If, in examining the cases referred to, there is borne in mind the distinction above discussed between controversies which involve only questions of law and those which involve issues essentially of fact, or call for the exercise of administrative discretion, it will be found that the conflict described does not exist, and that the decisions referred to are in harmony also with reason.”

Appellant desires to emphasize the thought above: That though respondent can and undoubtedly will show cases where application of the rule has been refused, these cases are not at all inconsistent with appellant's contention, but sustain it on the fundamental premises of the rule, bearing in mind that the case at bar is an instance of the interpretation of an administrative regulation, requiring expert analysis of operating facts, and discretionary application of the regulation, by an administrative authority already clothed with jurisdiction.

Anti-trust suits have been a fruitful source of cases involving the line of demarcation. Thus in *Terminal Warehouse Co. v. Pennsylvania R. Co.* (1935), 56 S.

Ct. 546, 297 U.S. 500, 80 L. Ed. 827, Justice Cardozo in refusing to take cognizance of an action premised on the anti-trust statutes, but involving administrative discretion in the fixing of reasonable rates, first says on page 513 of 297 U.S.:

“Even so, the right to sue, however explicit on its face, was held to have been partially superseded in respect of private suitors by the adoption of the Shipping Act, which as to transactions within its range gave the only remedy available. The conclusion was reinforced by a reference to Keogh’s case and to the need for a uniformity difficult of attainment when jurisdiction is divided.

“What was said in these opinions is precisely applicable here. If a sufferer from the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair. *Texas & P.R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L. ed. 553, 27 S. Ct. 350, 9 Ann. Cas. 1075; *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U.S. 452, 54 L. ed. 280, 30 S. Ct. 155; *Robinson v. Baltimore & O. R. Co.*, 222 U.S. 506, 56 L. ed. 288, 32 S. Ct. 114; *Northern P. R. Co. v. Solum*, 247 U.S. 477, 483, 62 L. ed. 1221, 1226, 38 S. Ct. 550; *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291, 66 L. ed. 943, 946, 42 S. Ct. 477, and see U. S. C. A. title 15, Section 26; construed in *Central Transfer Co. v. Terminal R. Asso.* 288 U.S. 469, 77 L. ed. 899, 53 S. Ct. 444, *supra*.”

But on the other hand, on page 515 of 297 U.S.:

“In thus holding we do not intimate that never in any circumstances can a carrier become a party to a conspiracy in restraint of trade or commerce with liability for treble damages. This has been made plain already. We enlarge on it for greater certainty. Wherein the case is now deficient will be made clearer by example. One may suppose a business of a manufacturer which has assumed the form and size of a monopoly, or if not already at that stage, is well upon the road thereto. Cf. *Standard Oil Co. v. United States*, 221 U.S. 1, 51, 61, 55 L. ed. 619, 641, 645, 31 S. Ct. 502, 34 L.R.A. (N.S.) 834, Ann. Cas. 1912D, 734; *United States v. American Tobacco Co.*, 221 U.S. 106, 55 L. ed. 663, 31 S. Ct. 632; *United States v. United States Steel Corp.*, 251 U.S. 417, 64 L. ed. 343, 40 S. Ct. 293, 8 A.L.R. 1121; *United States v. Swift & Co.*, 286 U.S. 106, 116, 76 L. ed. 999, 1006, 52 S. Ct. 460. One may add a situation in which a carrier has knowingly confederated with the owner to preserve such a business or foster it. Whatever liability grows out of that alliance is untouched by this decision. For present purposes we may assume that if such a situation should develop, the carrier would make itself a participant in the monopoly which it had conspired to produce, though its only overt act was a discriminatory rate of carriage. Again, a group of manufacturers, whose business in combination would not amount to a monopoly, might unite among themselves to lay a burden upon commerce by concerted action as to prices. *Swift & Co. v. United States*, 196 U.S. 375, 49 L. ed. 518, 25 S. Ct. 276; *United States v. American Linseed Oil Co.*, 262

U.S. 371, 67 L. ed. 1035, 43 S. Ct. 607; *Eastern States Retail Lumber Dealers' Asso. v. United States*, 234 U.S. 600, 58 L. ed. 1490, 34 S. Ct. 951, L.R.A. 1015A, 788. If a carrier were to give a preference in furtherance of that conspiracy, it would become a participant therein, or so we may assume, the damages being measured not merely by the consequences flowing from the preference, but by those flowing from the conspiracy in all its comprehensive unity."

Then (page 516):

"We conclude that for Merchants as well as for Pennsylvania whatever liability was incurred through the forbidden discrimination was under the act to regulate commerce and not for treble damages."

And so in *Georgia v. Pennsylvania R. Co.* (1944), 65 S. Ct. 716, 324 U.S. 439, 89 L. Ed. 1051, Justice Douglas refuses to apply the rule to an anti-trust conspiracy case, but on the basis of the large pattern of the entire conspiracy. Thus on page 460 of 324 U.S.:

"The fact that the rates which have been fixed may or may not be held unlawful by the Commission is immaterial to the issue before us. The Keogh Case indicates that even a combination to fix reasonable and non-discriminatory rates may be illegal. 260 U.S. p. 161, 67 L. ed. 187, 43 S. Ct. 47. The reason is that the Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violation of the anti-trust laws. Thus a

‘zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself.’ *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 506, 79 L. ed. 1023, 1029, 55 S. Ct. 462. Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by a conspiracy among carriers who employ unlawful tactics. If the rate-making function is freed from the unlawful restraints of the alleged conspiracy, the rates of the future will then be fixed in the manner envisioned by Congress when it enacted this legislation. Damage must be presumed to flow from a conspiracy to manipulate rates within that zone.”

And further (page 462 of 324 U.S.):

“We intimate no opinion whether the bill might be construed to charge more than that or whether a rate-fixing combination would be legal under the Interstate Commerce Act and the Sherman Act but for the features of discrimination and coercion charged here. We are dealing with the case only in a preliminary manner. Cf. *Missouri v. Illinois*, 200 U.S. 496, 517, 518, 50 L. ed. 572, 577, 578, 26 S. Ct. 268. The complaint may have to be amplified and clarified as respects the coercion and discrimination charged, the damage suffered, or otherwise. We do not test it against the various types of motions and pleadings which may be filed. We construe it with that liberality accorded the complaint of a sovereign State as presenting a substantial question with sufficient clarity and specificity as to require a joinder of issues.”

The Court had said on page 455 of 324 U.S.:

“The policy behind these restrictions placed on suitors by the Congress was aptly stated in *Terminal Warehouse Co. v. Pennsylvania R. Co.*, supra (297 U.S. p. 513, 80 L. ed. 835, 56 S. Ct. 546), as follows: ‘If a sufferer from the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair.’ We adhere to these decisions. But we do not believe they or the principles for which they stand are a barrier to the maintenance of this suit by Georgia.”

This learned Court will quickly recognize the distinction afforded by these conspiracy cases when it is remembered that a lawful act can be part of a conspiracy if it is to an unlawful end.

Thus, in cases of simple construction of tariff language, akin to the construction of words of a contract (also see *Brown & Sons Lumber Co. v. Louisville & N. R. Co.* (1937), 57 S. Ct. 265, 81 L. Ed. 301, 299 U.S. 393), and cases where the commission action is in itself one of the ingredients of an asserted large pattern of conspiracy, the rule may not be applied.

But where there are facts to be administratively determined, and the action is within that of the Board's field, the reasons of the rule require its application.

On premises identical with those controlling application of the rule of Interstate Commerce cases, the rule of primary jurisdiction has been applied to the Federal Communications Act. In *Rochester Telephone Corp. v. U. S.* (1939), 59 S. Ct. 754, 307 U.S. 125, 83 L. Ed. 1147, a case actually involving the scope of review of an administrative ruling, the Court observes (page 138 of 307 U.S.):

“Recognition of the Commission’s expertise also led this Court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.

“From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L. ed. 553, 27 S. Ct. 350, 9 Ann. Cas. 1075. *Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked.* The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission’s order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission’s order becomes incontestable. *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U.S. 452, 470, 54 L. ed. 280, 287, 30 S. Ct. 155; *Interstate Commerce Commission v. Union P. R. Co.*, 222 U.S. 541, 56 L. ed. 308, 32 S. Ct. 108.” (Italics supplied.)

And in application to the Shipping Act, in *United States Navigation Co. v. Cunard S. S. Co.* (1932), 52 S. Ct. 247, 284 U.S. 474, 76 L. Ed. 408, we find the Supreme Court affirming a dismissal of suit under the anti-trust acts premised on the lawfulness of an agreement within the jurisdiction of the administrative body. The Court says (page 487 of 284 U.S.):

“It is said that the agreement referred to in the bill of complaint cannot legally be approved. But this is by no means clear. In the first place, while the allegations of the bill must be taken as true upon the motion to dismiss, they still are subject to challenge by pleading and proof if the motion be denied. We cannot assume that, in a proceeding before the board in which the whole case would be open, similar allegations will not be denied or met by countervailing affirmative averments. In any event, it reasonably cannot be thought that Congress intended to strip the board of its primary original jurisdiction to consider such an agreement and ‘disapprove, cancel or modify’ it, because of a failure of the contracting parties to file it as 15 requires. A contention to that effect is clearly out of harmony with the fundamental purposes of the act and specifically with the provision of p. 22 authorizing the board to investigate *any* violation of the act upon complaint or upon its own motion and make such order as it deems proper. And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to

usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.”

How appropriate is the language referring to the peculiar nature of ocean traffic, in its application to air traffic!

And in the District Court case of *Adler v. Chicago & Southern Air Lines, Inc.* (Mo. 1941), 41 Fed. Supp. 366, a passenger asserts a claim for alleged failure of passage, and the Court in applying the rule asserts (367):

“The Supreme Court held in the case of *United States Navigation Co. v. Cunard Steamship Co.*, 1932, 284 U.S. 474, 52 S. Ct. 247, 76 L. Ed. 408, that the doctrine of primary jurisdiction likewise applied in cases involving the practices of steamship companies subject to regulation under the Shipping Act of 1916, 46 U.S.C.A. p. 801 et seq. In its decision the Court recognized that the Shipping Act of 1916, in its general scope and purpose, closely parallels the Interstate Commerce Act, 49 U.S.C.A. p. 1 et seq.

“Just as the Shipping Act of 1916 parallels the Interstate Commerce Act, so does the Civil Aeronautics Act of 1938, in its general scope and purpose, closely parallel both the Interstate Commerce Act and the Shipping Act of 1916. Each act creates an administrative agency, and each gives that agency jurisdiction to regulate a par-

ticular type of common carrier, one by land, one by water and one by air. Each commission and board has the power to prescribe reasonable rates, to prevent unjust discrimination and undue preference and prejudice, and to regulate the rules, regulations and practices of the carriers subject to its jurisdiction.”

The rule of primary jurisdiction now having been delineated as to its application in its fundamental purposes, the boundaries of its application, and its application to other administrative bodies, we can undertake the question of its application to, first, the Civil Aeronautics Act of 1938 as amended, and secondly, to this case.

Section 401 (a) of the Act (49 U.S.C. 481(a)) provides:

“No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: Provided, That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.”

Section 416 of the Act (49 U.S.C. 496) provides:

“The Board may from time to time establish such just and reasonable classifications or groups

of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

“EXEMPTIONS.

“(b) (1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.”

By virtue of the express authority vested in it by Congress, and in particular under the provisions of the above section, the Board promulgated Economic Regulation 292.1, which in the form as revised and adopted May 5, 1947, effective June 10, 1947, is pertinent in point of time to the matter now before this Court. The full text of the Regulation in the above mentioned revised form is reprinted in full as an appendix hereto.

Thus under the authority of Section 416 of the Act (49 U.S.C. 496) the Board in Section 292.1(c)(1) of the Regulations *exempted all carriers as to whom the Board by issuance of a Letter of Registration* caused the exemption to be effective, from the provisions of Title IV of the Act (except as to certain requirements of standards and reports) of which Section 401(a) (49 U.S.C. 481(a)) is a part. And the only basis of plaintiff and respondent's action is an alleged violation of Section 401(a) from which appellant has, by authorized action of the Board, been exempted.

Then the entire tenor and most of the remaining provisions of the Regulations clearly indicate that the Board having assumed jurisdiction by the issuance of a Letter of Registration had likewise assumed full and complete authority of the matters pertaining to the Regulations, and of *all alleged violations of the Regulations*. Section 292.1(d)(1) of the Regulations expressly provides for the issuance of a Letter of Registration, stating:

“From and after 60 days after the effective date of this section no Irregular Air Carrier may engage in any form of air transportation unless there is then outstanding and in effect with respect to such air carrier a Letter of Registration issued by the Board: *Provided*, That if any Irregular Air Carrier, otherwise authorized to engage in air transportation pursuant to this section, shall file with the Board within 60 days after the effective date of this section, an application for a Letter of Registration, such applicant may engage in such air transportation until such Let-

ter has been issued, or such applicant has been notified that it appears to the Board that such applicant is not entitled to the issuance of such Letter.”

And then Section 292.1(d)(2) specifically provides for a termination of the Letter of Registration, after *action* is taken and findings are made by the Board. It reads:

“Upon the filing of proper application therefor, the Board shall issue, to any Irregular Air Carrier, a Letter of Registration which, unless otherwise sooner rendered ineffectively, shall expire and be of no further force and effect, upon a finding by the Board that enforcement of the provisions of section 401 (from which exemption is provided in this section) would be in the public interest and would no longer be an undue burden on such Irregular Air Carrier or Class of Irregular Air Carriers. Such application shall be certified to by a responsible official of such carrier as being correct, and shall contain the following information: (i) date; (ii) name of carrier; (iii) mailing address; (iv) location of principal operating base; (v) if a corporation, the place of incorporation, the name and citizenship of officers and directors and a statement that at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions; (vi) if an individual or partnership, the name and citizenship of owners or partners; (vii) the types and numbers of each type of aircraft utilized in air transportation. Such application shall be submitted in duplicate in letter form or on C.A.B.

Form No. 2789 which is available on request for the convenience of applicants.”

Section 292.1(d)(4) provides for suspension:

“Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest.”

And of particular importance to this appeal are the express provisions of Section 292.1(d)(5) which provides for revocation by reason of violation, after notice *and hearing* by the Board. This section reads:

“Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provision of the Civil Aeronautics Act of 1938, as amended, or of any order, rule or regulation issued under any such provision, or of any term, condition or limitation of any authority issued under said Act or regulations.”

Appellant wishes to again point out that appellant had been issued such a Letter of Registration, granted such exemption from Section 401(a) (49 U.S.C. 481(a)), and *at all times* was and is now subject to the control of the Board under the above provisions, which give the Board all necessary power and authority to act.

The entire history and back-ground of Economic Regulation 292.1 and the authority for it vested by Congress under Section 416 of the Act (49 U.S.C. 496) was in recognition of the complex and unique

factual problems incident to air transportation and its present period of development. The public demand for such service, the need of irregular or unscheduled service, the unpredictability of the demand, the highly varying local conditions, and the desire to encourage healthy and proper growth of this comparatively new field of transportation are among the numerous reasons given by the Board, and to be taken as being in the mind of Congress, in vesting in the Board the broad and flexible power of regulation and exemption, provided for in the Act, and for the Board having taken full and complete action under such authority.

The Act itself is further replete with provisions demonstrating the intent of Congress to vest every lawful authority and power in the Board to fully and completely regulate and control air transportation.

Thus the provisions of Section 1002 (a-c) of the Act (49 U.S.C. 642 (a-c)) referred to in the opening statement, and which read:

“Sec. 1002. (a) Any person may file with the Authority a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Authority to investigate the matters complained of. Whenever the Authority is of the opinion that any complaint does not state facts which warrant an investigation or action on its part, it may dismiss such complaint without hearing.

“(b) The Authority is empowered at any time to institute an investigation, on its own initiative, in any case and as to any matter or thing concerning which complaint is authorized to be made to or before the Authority by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Authority shall have the same power to proceed with any investigation instituted on its own motion as though it had been appealed to by complaint.

“(c) If the Authority finds, after notice and hearing, in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Authority shall issue an appropriate order to compel such person to comply therewith.”

vests full authority over violations, and the further provisions go on to provide for control of rates and practices.

And Section 411 of the Act (49 U.S.C. 491) empowers the Board to investigate unfair practices. It reads:

“The Authority may, upon its own initiative or upon complaint by any air carrier or foreign air carrier, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier or foreign air carrier has been or is engaged in unfair or deceptive practices or unfair methods

of competition in air transportation. If the Authority shall find, after notice and hearing, that such air carrier or foreign air carrier is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier or foreign air carrier to cease and desist from such practices or methods of competition.”

Further, the very broad powers of the Board, conferred by Section 205 of the Act (49 U.S.C. 425) and of which 205 (a) reads:

“The Authority is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act.”

further illustrates the Congressional intent.

Of corollary value, the extent of judicial review provided in Section 1006 of the Act (49 U.S.C. 646) is in accord with the doctrine of primary jurisdiction of the Board. For example, Section 1006(e) (49 U.S.C. 646(e)) reads:

“The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so.”

Section 1007(a) of the Act (49 U.S.C. 647(a)) provides:

“If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Authority, its duly authorized agent, or, in the case of a violation of section 401(a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and enjoining upon them obedience thereto.”

It is on the basis of the last mentioned section that plaintiffs instituted their action.

But these provisions do not provide any such basis of action because defendant and appellant *was exempted* from the provisions of Section 401(a) (49 U.S.C. 481(a)) by having been issued as an administrative act a Letter of Registration under 292.1 of the Economic Regulations promulgated pursuant to Section 416 of the Act (49 U.S.C. 496(a) and (b)), and

were and are now subject to the full administrative power of the Board. A violation of Section 401(a) could thus not be before the Court. By necessity, to entertain the action, the District Court had to construe 292.1 of the Economic Regulations, and consider as a factual matter, a complex body of facts as to its application and violation, a function expressly charged by the Act to the primary jurisdiction of the Civil Aeronautics Board under the Civil Aeronautics Act of 1938 as amended, and by the express provisions referred to.

Thus perforce, at the outset this was *not* an injunction having to do with violation of 401(a), but actually a construction and judicial determination of the application and import of the Economic Regulation of the Civil Aeronautics Board, who had already taken full and complete jurisdiction over appellant when it issued to appellant a Letter of Registration exempting it from compliance with Section 401(a) of the Civil Aeronautics Act as amended. (49 U.S.C. 481(a).)

And to entertain such a proceeding, the Court had to consider an extensive body of facts, and apply administrative discretion under administrative regulations, a function peculiarly primarily administrative.

It would most certainly be extreme to assume that Congress, fully mindful of the long and well-established development of the primary jurisdiction rule, contemplated in enacting Section 1007 that as applied to this specific Act, any different principle should apply. Should we believe, mindful of the salutary

purposes of the rule, and its importance in its application to orderly administrative procedure, that in expanding to this newest field of commerce, that Congress intended to carry with it all established principles of administrative procedure.

Thus the Board in the case at bar, had full power, and even more was charged by Congress with the duty, to consider appellant's specific case, in the light of the intent of the law and Regulations, and even to make a specific regulation pertaining to the operations of this specific matter. The Board could enlarge or decrease, amend or adjust, and determine the application of its regulations, with the broadest of powers. A proper decision required the exercise of administrative discretion as to the public interest, based on as complete scrutiny of the facts by the Board peculiarly and properly equipped to ascertain and determine such facts, and to apply the proper regulations in the light of the entire national interest in air transportation.

Appellant urges that the primary jurisdiction rule in all its features applies to the Act which is pertinent here.

As in the case of the application of the rule to the other Acts, there are instances where the primary jurisdiction rule would not apply. And in enacting Section 1007, Congress can be assumed to have had such instances in mind.

Thus as in the District Court of Alaska decision (*Alaska Air Transport, Inc. v. Alaska Airplane*

Charter Company, No. 5588-A, District Court for the Territory of Alaska, Division Number One, at Juneau) decided August 20, 1947, the enjoined defendant had *neither* certificate of public convenience and necessity, *nor* Letter of Registration. It had not submitted to the jurisdiction of the Board, nor was it under its cognizance. Thus no administrative action, rule or regulation was involved.

But where, as in the case at bar, the Board has acted, and has full cognizance, and it is essentially a valid ruling of the Board which must be construed and applied, requiring attention to complex operating facts, the whole spirit of the rule dictates its application.

Otherwise, as in *Aron v. Pennsylvania R. Co.* (CCA-2, 1935), 80 Fed. (2d) 100, where the Court had before it tariff charges and practices alleged to be in violation of Interstate Commission rulings, the Court in affirming a judgment for defendant, inter alia, on the basis of the rule, states (101):

“The question of whether or not certain services are within the definition of transportation is not purely a question of law, but it involves the determination of a fact. *Atchison, Topeka & Santa Fe R. Co. v. United States*, 295 U. S. 193, 55 S. Ct. 748, 752, 79 L. Ed. 1382; *Adams v. Mills*, 286 U. S. 397, 52 S. Ct. 598, 76 L. Ed. 1184. In the *Atchison Case*, the court reversed a dismissal of a suit to enjoin an order of the commission on the ground that the orders were invalid for lack of a prior finding of fact by the commission. Similarly, we think the question in this case is not

solely one of law but of fact. The determination may be given collateral effect. See *A. J. Phillips Co. v. Grand Trunk Western R. Co.*, 236 U. S. 662, 665, 35 S. Ct. 444, 59 L. Ed. 774; *Keogh v. Chicago & N.W.R. Co.*, 271 F. 444 (C.C.A. 7); *National Pole Co. v. Chicago & N.W.R. Co.*, 211 F. 65 (C.C.A. 7). And the determination of the commission will not be reversed if it is neither arbitrary nor unsupported by the evidence. *Adams v. Mills*, 286 U. S. 397, 52 S. Ct. 589, 76 L. Ed. 1184; *Standard Oil Co. v. United States*, 283 U. S. 235, 51 S. Ct. 429, 75 L. Ed. 999. However, the courts are not concluded from examining anew a question involving the jurisdiction of the commission. See *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541, 547, 32 S. Ct. 108, 56 L. Ed. 308. In accordance with this rule, there have been instances of the court's ruling on whether or not certain situations came within 'transportation.' In the *Atchison & Santa Fe Case*, *supra*, on the question of whether a certain situation was 'transportation,' the court said: 'Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by section 15(5) (49 U.S.C.A. p. 15 (5)).' This was spoken of shipments which had reached the unloading chutes and were being taken out over a certain route through the stockyards. Even though, in certain circumstances, transportation ends with the delivery of the livestock at the unloading chutes at destination, it does not necessarily end at the unloading chutes where the unloading is an incident in the trip dictated by the Twenty-

Eight Hour Law (34 Stat. 607, 608, 49 U.S.C.A. pp. 71, 72).

“The Hepburn Act of June 29, 1906 (34 Stat. 584, c. 3591), amending the Interstate Commerce Act, broadened the definition of ‘transportation’ to give the commission jurisdiction over services necessarily incidental to shipment. These incidentals had been the sources by means of which abuses of overcharges and discrimination had been practiced and Congress brought the entire body of such services within the term ‘transportation.’ See *Cleveland, C. C. & St. Louis Railway Co. v. Dettlebach*, 239 U. S. 588, 593, 36 S. Ct. 177, 60 L. Ed. 453.”

And important to observe (103):

“The determination of damages in the instant case involves a finding of a reasonable rate, and the court will not determine that question without a prior finding by the commission. Although section 9 (49 U.S.C.A. p. 9) gives an apparently clear right to sue, the courts in the interest of uniformity have declined to accept the decision of questions involving functions essentially belonging to the commission. *Great Northern R. Co. v. Merchants’ Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943; *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506, 32 S. Ct. 114, 56 L. Ed. 288; *Norge Corporation v. Long Island R. Co.* (C.C.A. 2), 77 F. (2d) 312. The court below correctly declined to entertain this suit, since there had been no prior finding by the

Interstate Commerce Commission as to these appellants' damages."

And as aptly stated in *Armour & Co. v. Alton R. Co.* (1941), 61 S. Ct. 498, 312 U. S. 195, 85 L. Ed. 771:

"A court's adjudication of this question in this case would not uniformly benefit all shippers for whom respondents have transported livestock. Whether or not such a refund would amount to a discrimination should be determined by studies such as those the Interstate Commerce Commission is especially empowered to make.

"Sixth. The complaint alleges that petitioner is willing to accept delivery at any point in the station area. What the station area embraces is not defined. Whether there is property in the area on which the railroads could erect pens is not shown. To decide this issue would require a court to define the boundaries of a station named in a tariff approved by the Interstate Commerce Commission.

"The complexities of the situation here presented are graphically illustrated in the companion case of *Swift & Co. v. Alton R. Co.*, 238 Inters Com Rep 179. Swift, one of Armour's competitors, took its petition for alteration of the same long-standing practice directly to the Commission. That expert body found it a necessary prerequisite to decision to have a trial examiner conduct extensive hearings, compiling in the process a record of 5 volumes, 1147 pages, and numerous exhibits.

“The principles making up the so-called primary jurisdiction doctrine are well settled. This is obviously a case for this application.” (Page 201 of 312 U. S.)

Not only is the question of uniformity of decision as among courts compelling in its force to require application of the rule, but also uniformity of decision as among courts applying to this specific case.

If the view of the District Court in the case at bar was upheld, the various courts which could take jurisdiction could express various and conflicting rulings. A defendant would then be subject to as many possible decisions as there are Districts in which its operations are conducted. These considerations show the importance to orderly administrative procedure established by the rule.

The very decree and writ granted by the District Court in the case at bar illustrates in a most effective way the reasons why the Court should have asserted the rule of primary jurisdiction and refused jurisdiction.

In the decree and writ the Court endeavored to repeat some of the language of Sec. 292.1 of the Economic Regulations and then to apply as a measuring rod a specific application made by the Board in what appears to be a Board decision—*Matter of the Non-certified Operations of Trans-Caribbean Air Cargo Lines, Inc.*—Docket 2593—decided March 14, 1947. In so doing, the Court, in absence of the opportunity

which the Board would have had, was forced to seize upon a situation utterly unlike and of no relationship to that of appellant.

Trans-Caribbean operates in an entirely different area, over a 3000 mile route with entirely different aircraft, and entirely different effect on the national interest in air transportation. It is for the Board to say in the exercise of the duty charged upon it by Congress what the requirements of public interest would properly be as applied to the specific operation of appellant.

The entire decree and writ evidences that the District Court was hard put to word the decree and writ so that it would be workable under the practical exigencies of operation. So in recognition of the difficulty the District Court had to insert the provision to which attention has heretofore been invited, to wit:

“Leave to apply for a modification of this decree and the writ issued in pursuance hereof is hereby granted either party in the event the Civil Aeronautics Board shall hereafter modify or rescind the aforesaid regulations or its interpretation placed thereon by said agency;”

Thus the decree and writ by its very terms is thrown open to any future administrative processes of the Board. The District Court has thus in effect been forced to admit the jurisdiction of the Board, but nevertheless entered a decree and writ violative of the primary jurisdiction of the Board, and which can only serve to confuse and conflict with orderly ad-

ministrative procedure, rather than to clarify and assist, which is the true function of judicial procedure.

SUMMARY.

In summation, appellant wishes to emphasize that the District Court did not in effect enjoin a violation of Section 401(a) of the Act (49 U.S.C. 481(a)), but actually in every sense, construed and applied an administrative regulation. Appellant was by the very terms of the Act and its Letter of Registration exempt from Section 401(a), and its alleged violation of the Regulation giving basis to such exemption, the only question which could be, and which was decided, was one which by every reason for the established rule of primary jurisdiction, should have been determined by the Board. Most certainly the rule applies to the Act, and it is not to be believed Congress intended any other result. The violation, if any, would be one of complex fact, requiring administrative discretion, and of which uniformity of decision is most essential, all of which are major criteria requiring application of the rule of primary jurisdiction.

The Economic Regulations to begin with are created out of administrative discretion, based on long factual investigation, and their application to a given case can be no different.

Appellant respectfully prays that the judgment and decree be reversed, the writ of injunction be ordered

vacated, and the matter remanded with a direction of dismissal.

Dated, San Francisco, California,
September 13, 1948.

Respectfully submitted,
SAI CHOW DOO,
FREDERICK L. HEWITT,
COATES LEAR,
Attorneys for Appellant.

BLAIR AND BLAIR,
FONG, MIHO & CHOY,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

SECTION 292.1 OF THE ECONOMIC REGULATIONS

IRREGULAR AIR CARRIERS

(a) *Applicability.*—This section shall not apply to any air carrier authorized by a certificate of public convenience and necessity to engage in air transportation, to Alaskan Air Carriers, to operations within Alaska, or to any non-certificated air carrier engaged in air transportation pursuant to special or individual exemption by the Board or pursuant to exemption created by any other section of the Economic Regulations.

(b) *Classification.*—There is hereby established a classification of non-certificated air carriers to be designated as “Irregular Air Carriers.” An Irregular Air Carrier shall be defined to mean any air carrier (1) which does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended, (2) which directly engages in interstate or overseas air transportation of persons and property or foreign air transportation of property only, and (3) which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air

carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points. Within the meaning of this definition a "point" shall mean any airport or place where aircraft may be landed or taken-off, including the area with a 25-mile radius of such airport or place.

(c) *Exemptions.*

(1) *General.*—Except as otherwise provided in this section, Irregular Air Carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, other than the following:

(i) Subsection 401(1) (Compliance with Labor Legislation);

(ii) Section 403 (Tariffs);

(iii) Subsection 404(a) (Carrier's Duty to Provide Service, etc.), only in so far as said subsection requires air carriers to provide safe service, equipment, and facilities in connection with air transportation;

(iv) Subsection 404(b) (Discrimination);

(v) Subsection 407(a) (Filing of Reports): *Provided*, That no provision of any rule, regulation, term, condition or limitation prescribed pursuant to said subsection 407(a) shall be applicable to Irregular Air Carriers unless such rule, regulation, term, condition or limitation expressly so provides;

(vi) Subsection 407(b) (Disclosure of Stock Ownership);

(vii) Subsection 407(c) (Disclosure of Stock ownership by Officers or Directors);

(viii) Subsection 407(d) (Form of Accounts): *Provided*, That no provision of any rule, regulation, term, condition or limitation prescribed pursuant to said subsection 407(d) shall be applicable to Irregular Air Carriers unless such rule, regulation, term, condition or limitation expressly so provides;

(ix) Subsection 407(e) (Inspection of Accounts and Property);

(x) Section 408 (Consolidation, Merger, and Acquisition of Control): *Provided*, That Irregular Air Carriers shall be exempt from section 408 in so far as said section would make it unlawful, without prior approval by the Board, (a) for any Irregular Air Carrier or any person controlling any such carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of another Irregular Air Carrier, (b) for any Irregular Air Carrier to consolidate or merge with another Irregular Air Carrier, and (c) for any Irregular Air Carrier or any person controlling any such air carrier to acquire control of another Irregular Air Carrier; *Provided further*, That any Irregular Air Carrier which consolidates or merges with another Irregular Air Carrier and any Irregular Air Carrier or any person controlling any such carrier that acquires control of, or purchases, leases or contracts to operate the proper-

ties, or any substantial part thereof, of another Irregular Air Carrier pursuant to the exemption granting herein, shall submit to the Board, not more than 30 days following the consummation of the transaction, a report indicating in reasonable detail the nature and result of the transaction.

(xi) Subsection 409(a) (Interlocking Relationships): *Provided*, That if an application by any Irregular Air Carrier for approval of an interlocking relationship in existence on the effective date of this section is filed with the Board prior to a date 30 days after the effective date of this section, such air carrier may retain the officer, director, member, or stockholder involved in such relationship pending final disposition by the Board of said application: *Provided further*, That Irregular Air Carriers shall be exempt from subsection 409(a) in so far as said subsection would make it unlawful, without prior approval by the Board, (a) for any Irregular Air Carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in another Irregular Air Carrier, (b) for any Irregular Air Carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in another Irregular Air Carrier;

(xii) Subsection 409(b) (Profit from Transfer of Securities);

(xiii) Section 410 (Loans and Financial Aid);

(xiv) Section 411 (Methods of Competition);

(xv) Section 412 (Pooling and Other Agreements): *Provided*, That Irregular Air Carriers shall be exempt from section 412 until 60 days after the effective date of this section: *Provided further*, That Irregular Air Carriers shall be exempt from section 412 in so far as said section would require any Irregular Air Carrier to file with the Board a copy or a memorandum of certain contracts or agreements (other than contracts or agreements for pooling or apportioning earnings, losses, traffic, service or flying equipment), or of modifications or cancellations thereof, between such carrier and any other Irregular Air Carrier;

(xvi) Section 413 (Form of Control);

(xvii) Section 414 (Legal Restraints);

(xviii) Section 415 (Inquiry into Air-Carrier Management);

(xix) Section 416 (Classification and Exemption of Carriers).

(2) *Additional Exemptions for Irregular Air Carriers Utilizing Small Aircraft.*—Subdivisions (ii), (iv), (vi), (vii), (x), (xi), (xiii) and (xv) of subparagraph (1) of this paragraph shall not apply to any Irregular Air Carrier which does not utilize in its air transportation services any single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds, or three or more aircraft unit (not including any aircraft unit having an allowable gross

take-off weight of less than 6,000 pounds) having an aggregate allowable gross take-off weight in excess of 25,000 pounds.

(3) *Additional Temporary Exemptions in Foreign Air Transportation.*—Notwithstanding any other provisions of this section, Irregular Air Carriers for a period of three months after the effective date of this section, shall, with respect to foreign air transportation of persons, be exempt from all provisions of sections 401 (except subsection 401(1)) and 403 of the Civil Aeronautics Act of 1938, as amended, only, however, to the extent that such foreign air transportation of persons is confined to operations of the type exempted under section 292.1 prior to this revision of such section.

(4) *Approval of Certain Interlocking Relationships.*—To the extent that any officer or director of an Irregular Air Carrier would, without prior approval by the Board, be in violation of any provision of subsection 409(a)(3) of the Civil Aeronautics Act of 1938, as amended, by reason of any interlocking relationship with another Irregular Air Carrier, such relationship is hereby approved.

(5) *Effect on Other Statutes.*—The exemptions hereinabove granted from certain provisions and requirements of sections 408, 409, and 412 shall not constitute an order made under such sections, within the meaning of section 414, and shall not confer any immunity or relief from operation of the “antitrust

laws," or any other statute (except the Civil Aeronautics Act of 1938, as amended), with respect to any transaction, interlocking relationship or agreement otherwise within the purview of such section.

(6) *Operational Reports by Irregular Air Carriers.*

—On or before July 20, 1947, and thereafter on or before the 20th day of every October, January, April and July, each Irregular Air Carrier, except those Irregular Air Carriers utilizing only small aircraft, as specified in subparagraph (2) of this paragraph, shall file with the Board a quarterly operational report covering the period of the three preceding calendar months, showing all flights operated in air transportation during such period, and stating, with respect to each such flight, the dates of departures and arrivals and the origin, destination and intermediate points served. Whenever any Irregular Air Carrier theretofore utilizing only small aircraft, as specified in subparagraph (2) of this paragraph, undertakes to utilize in its air transportation services any single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds, or three or more aircraft units (not including any aircraft unit having an allowable gross take-off weight of less than 6,000 pounds) having an aggregate allowable gross take-off weight in excess of 25,000 pounds, such Irregular Air Carrier shall notify the Board in writing within not more than ten days after the actual commencement of such utilization.

(d) *Registration for Exemption.*

(1) *Letter of Registration Required.*—From and after 60 days after the effective date of this section no Irregular Air Carrier may engage in any form of air transportation unless there is then outstanding and in effect with respect to such air carrier a Letter of Registration issued by the Board: *Provided*, That if any Irregular Air Carrier, otherwise authorized to engage in air transportation pursuant to this section, shall file with the Board within 60 days after the effective date of this section, an application for a Letter of Registration, such applicant may engage in such air transportation until such Letter has been issued, or such applicant has been notified that it appears to the Board that such applicant is not entitled to the issuance of such Letter.

(2) *Issuance of Letter of Registration.*—Upon the filing of proper application therefor, the Board shall issue, to any Irregular Air Carrier, a Letter of Registration which, unless otherwise sooner rendered ineffective, shall expire and be of no further force and effect, upon a finding by the Board that enforcement of the provisions of section 401 (from which exemption is provided in this section) would be in the public interest and would no longer be an undue burden on such Irregular Air Carrier or Class of Irregular Air Carriers. Such application shall be certified to by a responsible official of such carrier as being correct, and shall contain the following information: (i) date;

(ii) name of carrier; (iii) mailing address; (iv) location of principal operating base; (v) if a corporation, the place of incorporation, the name and citizenship of officers and directors and a statement that at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions; (vi) if an individual or partnership, the name and citizenship of owners or partners; (vii) the types and numbers of each type of aircraft utilized in air transportation. Such application shall be submitted in duplicate in letter form or on C.A.B. Form No. 2789 which is available on request for the convenience of applicants.

(3) *Non-transferability of Letter of Registration.*

—A Letter of Registration shall be non-transferable and shall be effective only with respect to the person named therein.

(4) *Suspension of Letter of Registration.*—Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest.

(5) *Revocation of Letter of Registration.*—Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provision of the Civil Aeronautics Act of 1938, as amended, or of any order, rule or regulation issued under any such provision, or of any term, condition or limitation of any authority issued under said Act or regulations.

(e) *Separability*.—If any provision of this section or the application thereof to any air transportation, person, class of persons, or circumstance is held invalid, the remainder of the section and the application of such provisions to other air transportation, persons, classes of persons, or circumstances shall not be affected thereby. (52 Stat. 984 and 1004, as amended; 49 U. S. C. 425a and 496b).

NOTE: The record-keeping and reporting requirements of this section have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN,
Secretary.

(SEAL)

No. 11,865

In the United States Court of Appeals for the
Ninth Circuit

TRANS-PACIFIC AIRLINES, LIMITED, APPELLANT

vs.

HAWAIIAN AIRLINES, LIMITED, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE TERRITORY OF HAWAII

BRIEF OF CIVIL AERONAUTICS BOARD AS AMICUS CURIAE

EDWARD DUMBAULD,

WILLIAM D. McFARLANE,

*Special Assistants to the Attorney General
Department of Justice, Washington, D. C.*

EMORY T. NUNNELEY, Jr.,

General Counsel, Civil Aeronautics Board.

HERBERT A. BERGSON,

Assistant Attorney General.

FRANK J. HENNESSY,

United States Attorney.

JOHN H. WANNER,

*Assistant General Counsel,
Civil Aeronautics Board.*

OLIVER CARTER,

*Acting Chief, Enforcement and Litigation Section,
Civil Aeronautics Board.*

ROBERT BURSTEIN,

GILBERT E. ANDREWS,

Attorneys, Civil Aeronautics Board.



INDEX AND TABLE OF AUTHORITIES

TABLE OF CONTENTS

	Page
Statement of the Case.....	1
Summary of Discussion.....	5
Discussion.....	7
I. The complaint alleges facts establishing a violation of Section 401 (a) of the Act.....	7
A. The nature and extent of the exemption provided by Section 292.1 of the Economic Regulations.....	7
B. Since appellant's operations have been in excess of those authorized by Section 292.1 of the Economic Regulations, appellant is automatically outside of the exemption and in violation of Section 401 (a) of the Act.....	12
II. The lower Court has original jurisdiction to determine whether appellant's operations have been outside the scope of the exemption provided by Section 292.1.....	18
A. Section 1007 (a) of the Act was clearly designed to confer original jurisdiction upon the Court to enjoin any violations of Section 401 (a) upon application of a party in interest.....	18
B. Aside from the clear language and intent of Section 1007 (a), the doctrine of primary jurisdiction is not applicable to the question whether appellant's operations have been in excess of those permitted by Section 292.1 of the Economic Regulations.....	26
Conclusion.....	33
Appendix.....	34
Statute and Regulation Involved.....	34
Explanatory Statement.....	36
Findings.....	43

TABLE OF CASES

<i>Adler v. Chicago and Southern Air Lines, Inc.</i> , 41 F. Supp. 366 (E. D. Mo., 1941).....	20, 27
<i>American Airlines, Inc. v. Standard Air Lines, Inc.</i> , United States District Court for the Southern District of New York, Civil No. 47-272.....	16, 24, 31
<i>Barrett v. Gimbel Bros.</i> , 226 Fed. 623 (C. C. A. 3, 1915).....	27
<i>Brown, W. P., & Sons Lumber Co. et al. v. Louisville & Nashville Ry. Co. et al.</i> , 299 U. S. 393 (1937).....	27
<i>Burrus Mill and Elevator Co. v. Chicago, R. I. & P. Ry. Co.</i> , 131 F. (2d) 532 (C. C. A. 10, 1942).....	27

	Page
<i>Civil Aeronautics Board v. Winged Cargo, Inc.</i> , E. D. Pa., consent injunction entered December 16, 1947-----	11
<i>Consolidated Freightways, Inc. v. United States</i> , 136 F. (2d) 921 (C. C. A. 8, 1943)-----	18
<i>Continental Charters, Inc.</i> , <i>Matter of the Suspension and Revocation of Letter of Registration No. 621 issued to</i> , Docket No. 3288 (September 30, 1948)-----	11
<i>Crancer et al. v. Lowden et al.</i> , 315 U. S. 631 (1942)-----	30
<i>Danciger v. Wells Fargo & Co.</i> , 154 Fed. 379 (W. D. Mo., 1907)-----	29
<i>Flying Tiger Line, Inc., et al. v. Atchison, Topeka and Santa Fe Ry. Co.</i> , 75 F. Supp. 188 (S. D. Cal., 1947)-----	20, 21, 32
<i>Georgia Truck System, Inc. v. Interstate Commerce Commission</i> , 123 F. (2d) 210 (C. C. A. 5, 1941)-----	22
<i>Great Northern Ry. Co. v. Armour & Co.</i> , 26 F. Supp. 964 (N. D. Ill., 1939)-----	31
<i>Great Northern Ry. Co. v. Merchants Elevator Co.</i> , 259 U. S. 285 (1922)-----	26, 28, 31
<i>Interstate Commerce Commission v. Dunn</i> , 166 F. (2d) 116 (C. C. A. 5, 1948)-----	22
<i>Interstate Commerce Commission v. Fordham Bus Corp.</i> , 38 F. Supp. 739 (S. D. N. Y., 1941)-----	16, 17, 19, 22
<i>Interstate Commerce Commission v. Moland Bros. Trucking Co.</i> , 62 F. Supp. 921 (D. Minn., 1945)-----	17
<i>Interstate Commerce Commission v. Tank Car Oil Corp.</i> , 60 F. Supp. 133 (N. D. Ga., 1945), <i>aff'd</i> 151 F. (2d) 834 (C. C. A. 5, 1945)-----	22
<i>Investigation of Nonscheduled Air Services</i> , 6 C. A. B. 1049 (1946)-----	8, 10
<i>Louisville and Nashville R. R. Co. v. Cook Brewing Co.</i> , 223 U. S. 70 (1911)-----	28
<i>McDonald v. Thompson</i> , 305 U. S. 263 (1938)-----	23
<i>Mitchell Coal Co. v. Penna. R. R. Co.</i> , 230 U. S. 247 (1913)-----	27
<i>Murray Co. et al. v. Gulf Coast and Santa Fe Ry. Co. et al.</i> , 59 F. Supp. 366 (N. D. Tex. 1945)-----	27, 28, 31
<i>National Pole Co. v. Chicago and Northwestern Ry. Co.</i> , 211 Fed. 65 (C. C. A. 7, 1914)-----	31
<i>Pacific Northern Airlines v. Alaska Airlines, Inc.</i> , District Court for the Territory of Alaska, Third Division, No. A-4768-----	13, 14, 19
<i>Pacific Northern Airlines v. Northern Airlines</i> , District Court for the Territory of Alaska, Third Division, No. A-4769-----	13, 19
<i>Page Airways, Inc.</i> , 6 C. A. B. 1061 (1946)-----	10
<i>Pennsylvania Railway Co. v. Clark Bros. Coal Mining Co.</i> , 238 U. S. 456 (1915)-----	27
<i>Penna. R. R. v. Puritan Coal Co.</i> , 237 U. S. 121 (1915)-----	27, 30
<i>Penna. R. R. Co. v. Stineman Coal Mining Co.</i> , 242 U. S. 298 (1915)-----	27, 30
<i>Royal Brewing Co. v. M. K. T. Ry.</i> , 217 Fed. 146 (D. Kan., 1914)-----	29
<i>Skyline, Inc.</i> , <i>Matter of Non-Certificated Operations of</i> , Docket No. 2635 (May 20, 1947)-----	11
<i>Smyth v. Asphalt Belt Ry. Co.</i> , 267 U. S. 326 (1925)-----	22
<i>Spokane & Inland Empire R. R. Co. v. United States</i> , 241 U. S. 344 (1916)-----	16
<i>Standard Air Lines, Inc. Exemption Request</i> , Docket No. 3430 et al., decided October 14, 1948-----	8, 11

	Page
<i>Stickle, A. W., & Co. v. Interstate Commerce Commission</i> , 128 F. (2d) 155 (C. C. A. 10, 1942), cert. den. 317 U. S. 650 (1942)-----	22
<i>Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.</i> , 204 U. S. 426 (1907)-----	20-27
<i>Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.</i> , 270 U. S. 266 (1926)-----	21, 26
<i>Trans-Caribbean Air Cargo Lines, Matter of the Non-Certificated Operations of</i> , Docket No. 2593, Orders Serial No. E-370, dated March 14, 1947-----	9, 12
<i>Trans-Luxury Airlines, Inc., Matter of the Non-Certificated Operations of</i> , Docket No. 2589 (April 22, 1947)-----	11
<i>Trans-Marine Airlines, Inc.</i> , 6 C. A. B. 1071 (1946)-----	10
<i>Union Southern Airlines, Matter of Non-Certificated Operations of</i> , Docket No. 2637 (May 23, 1947)-----	11
<i>United States v. Chadwick</i> , 39 F. Supp. 204 (E. D. Pa., 1940)---	16, 17, 23, 25
<i>United States v. Krinvic Bros.</i> , 47 F. Supp. 48 (E. D. Pa., 1942)-----	16, 23
<i>United States v. Mertine</i> , 64 F. Supp. 792 (D. N. J., 1946)-----	16, 23
<i>United States v. Metropolitan Lumber Co.</i> , 254 Fed. 335 (D. N. J., 1918)---	28
<i>United States v. Motor Freight Express</i> , 60 F. Supp. 288 (D. N. J., 1945)---	23
<i>United States v. Trans-Missouri Freight Association</i> , 166 U. S. 290 (1897)-----	19
<i>United States v. Union Pacific R. Co.</i> , 20 F. Supp. 665 (S. D. Idaho, 1937)-----	16
<i>United States Navigation Co. v. Cunard Steamship Co.</i> , 283 U. S. 474 (1932)-----	27
<i>Matter of Virgin Islands Air Service Inc. et al</i> , Docket No. 3422 (November 1, 1948)-----	11
<i>Willis Air Service, Inc., Matter of the Non-Certificated Operations of</i> , Docket No. 2639 (April 22, 1947)-----	11

STATUTES AND MISCELLANEOUS

Civil Aeronautics Act of 1938, as amended, 52 Stat. 973, 49 U. S. C. 401-----	34
Sec. 1 (2)-----	2
Sec. 1 (10)-----	2
Sec. 1 (21)-----	2
Sec. 401 (a)-----	1-7, 12-15, 17-21, 24
Sec. 401 (h)-----	24
Sec. 416 (b)-----	3-5, 8
Sec. 416 (b) (1)-----	7
Sec. 1002 (a)-----	19
Sec. 1007 (a)-----	1-4, 6, 13, 18, 20, 21, 23, 25, 26, 32
Board's Economic Regulations:	
Sec. 292.1-----	3-9, 11-14, 16, 17, 19, 24, 30, 32
Sec. 292.1 (d) (4)-----	16
Sec. 292.1 (d) (5)-----	16
Sec. 292.2-----	13, 19
Doctrine of Primary Administrative Jurisdiction, 42 Am. Jur., pp. 698-702-----	27

Interstate Commerce Act:	Page
Sec. 1 (20), 49 U. S. C. 1 (20)-----	21
Sec. 9, 49 U. S. C. 9-----	32
Sec. 203 (b), 49 U. S. C. 303 (b)-----	13
Sec. 206 (a), 49 U. S. C. 306 (a)-----	15
Sec. 207 (a), 49 U. S. C. 307 (a)-----	15
Sec. 222 (a), 49 U. S. C. 322 (a)-----	22
Sec. 222 (b), 49 U. S. C. 322 (b)-----	22
Sec. 308 (c), 49 U. S. C. 908 (c)-----	32
Motor Carrier Act, Part II of the Interstate Commerce Act, 49 U. S. C. 301 et seq-----	15, 25
Packers and Stockyards Act, 7 U. S. C. A. 209, Sec. 306-----	32
Reorganization Plan No. IV, 5 F. R. 2421-2423-----	1

**In the United States Court of Appeals for the
Ninth Circuit**

No. 11,865

TRANS-PACIFIC AIRLINES, LIMITED, APPELLANT

vs.

HAWAIIAN AIRLINES, LIMITED, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE TERRITORY OF HAWAII

BRIEF OF CIVIL AERONAUTICS BOARD AS AMICUS CURIAE

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Territory of Hawaii permanently enjoining the appellant from engaging in air transportation in violation of Section 401 (a) of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. 481 (a)).¹

This action was brought in the court below on September 3, 1947, pursuant to the provisions of Section 1007 (a) of the Act (49 U. S. C. 647 (a)). The complaint alleges, in substance, as follows. The ap-

¹ The pertinent provisions of the Act (52 Stat. 973, 49 U. S. C. 401 et seq.) are set forth *infra*, pp. 34-36.

pellant, Trans-Pacific Airlines, Limited, an air carrier as defined in the Act (Section 1 (2), 49 U. S. C. 401 (2)), has been engaged in air transportation within the meaning of the Act (Sections 1 (10) and (21), 49 U. S. C. 401 (10) and (21)) between points within the Territory of Hawaii without having a certificate of public convenience and necessity from the Civil Aeronautics Board² as required by Section 401 (a) of the Act, and has conducted such air transportation operations on a regularly scheduled basis. Such operations have been in violation of the Act and have caused damage to the appellee, Hawaiian Airlines, Limited, a holder of a certificate of public convenience and necessity authorizing it to engage in air transportation between points within the said Territory of Hawaii. The appellee prayed the court for an injunction, both preliminary and permanent, restraining the appellant from the alleged violation of Section 401 (a) of the Act (R. 2-4).

On September 11, 1947, the lower court filed a "Memorandum of Ruling upon Motion for Preliminary Injunction," holding that appellant's operations constituted a violation of Section 401 (a) of the Act and that, therefore, Section 1007 (a) conferred jurisdiction upon the court to enjoin such operations at the request of the appellee, a party in interest within the purview of that Section. A preliminary injunction was accordingly

² Reorganization Plan No. IV, 5 F. R. 2421-2423, which became effective on June 30, 1940, reassigned the duties and functions of the "Civil Aeronautics Authority" under the Act in terms of the "Civil Aeronautics Board" and the "Administrator of Civil Aeronautics."

issued by the court (R. 9-12, reported in 73 F. Supp. 68).

On or about September 30, 1947, the appellant filed an answer challenging the jurisdiction of the court under Section 1007 (a) of the Act. The answer admitted that appellant has engaged in air transportation without a certificate of public convenience and necessity but denied that such a certificate was required by Section 401 (a) of the Act. The answer also denied that appellant conducted a regularly scheduled air transportation service between points within the Territory of Hawaii in violation of the Act.³

On November 10, 1947, the court, after trial of the issues on final hearing, made its findings of fact and conclusions of law. The court found that from January 1, 1947, to September 11, 1947, the appellant engaged in air transportation as a common carrier between points within the Territory of Hawaii and has "conducted a regular scheduled daily service as a common carrier between points within the Territory of Hawaii" without having a certificate of public convenience and necessity from the Board. The court further found that the appellant has a letter of registration issued to it by the Board pursuant to Section 292.1 of the Board's Economic Regulations but that during the aforesaid period the appellant has not operated within the allowable limits of said Section 292.1 (R. 13). The court concluded that the appellant's operations were not conducted under any exemptions pursuant to Section 416 (b) of the Act (49 U. S. C. 496 (b)); that such operations, therefore, constituted a violation of Section 401 (a) of

³ The answer has not been printed in the record.

the Act; and that, consequently the court had jurisdiction by virtue of Section 1007 (a) of the Act to grant the relief sought (R. 14-15). The writ of permanent injunction issued by the court enjoined the appellant from engaging in air transportation in violation of Section 401 (a) of the Act and from holding out to the public, expressly or by course of conduct, that it conducts air operations of greater regularity than that permitted by Section 292.1 of the Board's Economic Regulations. The writ provides that it will not prohibit operations of appellant in accordance with the exemption granted it by said Section 292.1 and that violations of the injunction shall be determined by the application of the standard of regularity currently adopted by the Board (R. 19-22).

This appeal is based solely on jurisdictional grounds. Appellant's contentions are as follows: (1) appellee as a party in interest is authorized by Section 1007 (a) of the Act to bring suit for injunctive relief only in case of a violation of Section 401 (a) of the Act. Appellant is the holder of a letter of registration as an irregular air carrier issued by the Board pursuant to Section 292.1 of the Board's Economic Regulations which exempts appellant from the requirements of Section 401 (a) of the Act with respect to irregular air transportation operations. Consequently, this is not an action to enjoin a violation of Section 401 (a) of the Act but to enforce a regulation of the Board. (2) The Board has primary jurisdiction to determine whether appellant's operations have been in excess of the exemption provided by Section 292.1 of the Economic Regulations.

The appellant does not challenge the court's findings that it conducted "a regular scheduled daily service".

SUMMARY OF DISCUSSION

The Board's position may be briefly summarized as follows:

1. Section 401 (a) of the Act provides that no air carrier shall engage in air transportation without a certificate of public convenience and necessity. Section 416 (b) of the Act authorizes the Board to exempt air carriers from certain requirements of the Act, including the certificate requirement of Section 401 (a). Consequently, any air transportation operations engaged in without a certificate authorizing such air transportation are in violation of Section 401 (a) of the Act unless they have been exempted from said Section. By Section 292.1 of its Economic Regulations, the Board created such an exemption for "Irregular Air Carriers," defined as air carriers who do not hold out to the public that they operate aircraft between designated points regularly or with a reasonable degree of regularity and whose air transportation services are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operations between such designated points. Since the appellant has, in fact, held out and rendered regular service, otherwise than as contemplated by Section 292.1 of the Economic Regulations, appellant has automatically ceased to be within the exemption and is automatically guilty of a violation of Section 401 (a) of the Act. Consequently, the appellee, as a party in interest, is entitled to maintain this action.

2. Section 1007 (a) of the Act was expressly designed to afford parties in interest, as well as the Board, a direct and independent judicial remedy against unauthorized air transportation in violation of Section 401 (a) of the Act. To hold that the Board has primary jurisdiction to determine the question of unauthorized air transportation and to require a prior proceeding on that question before the Board would not only be inconsistent with the language of Section 1007 (a) but would also nullify, to a large extent, the purpose of that Section. Aside from the clear language and intent of Section 1007 (a), the doctrine of primary jurisdiction would be inapplicable here since the problem here is not like one involving the reasonableness of a rate or the fairness of a practice requiring the special knowledge of an administrative tribunal. The kind of question involved here has been decided by courts in innumerable instances without requiring prior resort to the administrative tribunal. Assuming, *arguendo*, that the question whether appellant operated within the exemption provided by Section 292.1 of the Economic Regulations can in the first instance be said to require the exercise of administrative discretion, the Board has promulgated a standard for ascertaining the frequency and regularity of operations permitted under such exemption. In this case, certainly, no purpose would be served in requiring a further determination by the Board. Appellant operated a regular, scheduled daily service. Consequently, by any standard, its operations were outside the exemption of section 292.1.

DISCUSSION

I. The complaint alleges facts establishing a violation of Section 401 (a) of the Act

A. The nature and extent of the exemption provided by Section 292.1 of the Economic Regulations

The Act provides for only one form of economic authority for air carriers who engage in air transportation—the certificate of public convenience and necessity. Section 401 (a) of the Act provides that “No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority (now the Board) authorizing such air carrier to engage in such transportation.” In order to impart flexibility to the administration of the Act, Congress incorporated in the Act a provision, Section 416 (b) (1) (49 U. S. C. 496 (b) (1)) authorizing the Board, under certain circumstances, to grant exemptions from the detailed regulatory provisions of Title IV of the Act (49 U. S. C. A. 481 *et seq.*), including Section 401 (a). Section 416 (b) (1) provides as follows:

The Authority, from time to time and to the extent necessary, may * * * exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

The primary purpose of Section 416 (b) of the Act was to provide relief for the irregular and sporadic operations of the so-called "fixed-base" operators and for the carriers engaging in unusual or limited operations. See *Standard Air Lines, Inc., Exemption Request*, Docket No. 3430 *et al.*, decided by the Board October 14, 1948. Consequently, on October 15, 1938, shortly after the passage of the Act, the Board promulgated Section 292.1 of its Economic Regulations exempting such carriers, then called "non-scheduled" air carriers, from the provisions of Title IV. At the time the "non-scheduled" exemption order was first adopted and until the end of the war, non-scheduled air transportation was of limited economic significance. However, the release from military duty of thousands of persons who had received aviation training in the armed services, together with the almost simultaneous availability of large transport type aircraft from war surplus, resulted in the formation of numerous companies purporting to engage in so-called "non-scheduled operations." Many of these companies were utilizing aircraft of the type employed by the certificated or "scheduled" air lines, and were in fact conducting regular and substantial air transportation services. See *Investigation of Nonscheduled Air Services*, 6 C. A. B. 1049 (1946). Accordingly, effective June 10, 1947, the presently effective Section 292.1 was adopted⁴ for the purpose of narrowing the exemption and for the more effective regulation of

⁴ This regulation is set forth in the Appendix to Appellant's Brief. The Board's Explanatory Statement and Findings with respect to this regulation are set forth in the Appendix to this Brief, *infra* (pp. 36-49).

those persons availing themselves of the exemption. This was done both for the protection of the public from improper practices and for the protection of the certificated carriers against unregulated competition.⁵

Paragraph (b) of Section 292.1 of the Economic Regulations defines an "Irregular Air Carrier," in part, to mean "any air carrier * * * which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity, upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers." By way of further definition, the regulation also provides as follows:

No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points.

Although the definition in the regulation is necessarily set forth in general terms, the frequency and regularity of operations which are permitted under such definition are ascertainable as a result of a standard first applied in the consent order approved and entered by the Board in *Matter of the Non-Cer-*

⁵ Paragraph 1 of the Board's findings on adoption of the presently effective Section 292.1, *infra* (p. 44-45).

tificated Operations of Trans-Caribbean Air Cargo Lines, Docket No. 2593, Orders Serial No. E-370, dated March 14, 1947.⁶ By this order, the carrier was directed to cease and desist from operating flights of aircraft in air transportation:

3. (a) in such manner that any given or uniform number of flights are operated between the same two points per week or recurrently in successive weeks;

(b) regularly or with a reasonable degree of regularity, which regularity is reflected by the operation of a single flight per week on the same day of each week between the same two points, or is reflected by the recurrence of operations of two round-trip flights, or flights varying from two to three or more such flights, between any same two points each week in succeeding weeks, without there intervening other weeks or approximately similar periods at irregular but frequent intervals during which no such flights are operated so as thereby to result in appreciable definite breaks in service; it being intended by this subparagraph to require irregularity in service between any such points but not to preclude the operation of more than one or two such flights in any given week, nor to prescribe any specific maximum limitation upon the number of flights which may be performed in any one week, if infrequency and irregularity of service is otherwise achieved through variations in numbers of flights and intervals between flights and through

⁶ The general nature of operations permissible under Section 292.1 was previously discussed by the Board in *Investigation of Non-Scheduled Air Services*, *supra*, *Trans-Marine Airlines, Inc.*, 6 C. A. B. 1071 (1946), and *Page Airways, Inc.*, 6 C. A. B. 1061 (1946).

frequent and extended definite breaks in
service * * *

(c) otherwise than upon an occasional and infrequent basis restricted to such rarity and infrequency of flight as to preclude any uniform pattern or normal consistency of operation between such points * * *

This standard has been designated by the Board, in the Explanatory Statement accompanying the currently effective Section 292.1 (*infra*, p. 39) as a guide to operations permissible under the regulation and has been applied in a number of cases.⁷ Although such standard does not establish a rigid pattern for operations and, consistent with the intent of a regulation permitting irregular operations, permits flexibility in the operation of a particular irregular service, it nevertheless establishes definite criteria whereby it can be determined whether the operations of a carrier are in fact being conducted within the limits of the exemption. Thus, flights between designated points, whether one or more per week, must be staggered as to the days of the week

⁷ *Matter of the Non-Certificated Operations of Trans-Luxury Airlines, Inc.*, Docket No. 2589 (April 22, 1947); *Matter of the Non-Certificated Operations of Willis Air Service, Inc.*, Docket No. 2639 (April 22, 1947); *Matter of Non-Certificated Operations of Skyline, Inc.*, Docket No. 2635 (May 20, 1947); *Matter of the Non-Certificated Operations of Union Southern Airlines*, Docket No. 2637 (May 23, 1947); *Matter of the Suspension and Revocation of Letter of Registration No. 621 issued to Continental Charters, Inc.*, Docket No. 3288 (September 30, 1948); *Standard Air Lines, Inc., Exemption Request, Supra*; *Matter of Virgin Islands Air Service, Inc., et al.*, Docket No. 3422 (November 1, 1948). This standard has also been applied by the court in *Civil Aeronautics Board v. Winged Cargo, Inc.*, E. D. Pa., consent injunction entered December 16, 1947, as well as by the lower court in this case.

in successive weeks ; if more than one such flight is to be operated per week in successive weeks such flights must not only be staggered as to days of the week, but there must also be breaks in continuity of service for a week or approximately that period during which no flights are operated ; and the flights must be of such infrequency as to preclude any implication of a uniform pattern or normal consistency of operations. With respect to this latter requirement the *Trans-Caribbean* order indicates with clarity that two or more round-trip flights in recurring weeks without appreciable and definite breaks in service are in excess of those permitted under the Regulations.

B. Since appellant's operations have been in excess of those authorized by Section 292.1 of the Economic Regulations, appellant is automatically outside of the exemption and in violation of Section 401 (a) of the Act

The appellant has been issued no certificate of public convenience and necessity to engage in air transportation. It was only issued a letter of registration under Section 292.1 of the Economic Regulations whereby the Board has exempted from the operation of Section 401 (a) irregular air carriers as defined therein, that is, air carriers who do not operate regularly or with a reasonable degree of regularity between any two points. The Board has not exempted from the operation of Section 401 (a) any air carrier who does, in fact, operate regularly or with a reasonable degree of regularity between any two points. Consequently, since appellant has engaged in air transportation other than as an irregular air carrier within the meaning of Section 292.1, it was necessarily in violation of Section 401 (a), for the reason that

such operations have neither been authorized by a certificate of public convenience and necessity nor exempted from the requirement of having such a certificate.

This question has been thoroughly considered by District Judge Dimond in the cases of *Pacific Northern Airlines v. Northern Airlines* and *Pacific Northern Airlines v. Alaska Airlines*, District Court for the Territory of Alaska, Third Division, Nos. A-4769 and A-4768, respectively, decided December 12, 1947, and August 7, 1948. The *Northern Airlines* case cited involved the precise question here. A party in interest brought suit under Section 1007 (a) of the Act to enjoin a holder of a letter of registration under Section 292.1 from operating in air transportation in excess of the scope of Section 292.1. The court held that such operations constituted a violation of Section 401 (a) of the Act and could be enjoined upon application of a party in interest. The *Alaska Airlines* case involved Section 292.2 of the Board's Economic Regulations which exempted Alaskan Air Carriers from Section 401 (a) of the Act "insofar as the enforcement of said sections would prevent any such air carrier" from conducting charter trips and rendering other special services. In spite of the difference in language between Section 292.1 and Section 292.2, Judge Dimond saw no distinction between the two regulations as to the question of a violation of Section 401 (a) of the Act and held that operations beyond the scope of either regulations constituted a violation of such Section 401 (a). And there is, in fact, no such distinction. In the one case, the clear intention

of the regulation is to exempt only charter and special services and in the other case the equally clear intention of the regulation is to exempt only irregular operations.

Section 292.1, being an exemption from Section 401 (a), is inextricably related to Section 401 (a). It is, in essence, an exception or a proviso to Section 401 (a). It is as if Section 401 (a) read that no air carrier shall engage in any air transportation without a certificate, provided that no certificate shall be required with respect to irregular operations. The appellant was charged with the offense of violating Section 401 (a). To be relieved from such charge, appellant had the burden of proving that he was within the proviso or the exception, that is, that his operations were irregular. Since he was unable to prove that, he was necessarily operating in violation of Section 401 (a). As aptly stated by Judge Dimond in the *Alaska Airlines* case:

Section 401 (a) forbids all common carriage by air—regular and irregular, scheduled and nonscheduled—without a certificate. Section 416 (b) (2) gives the Board authority to exempt carriers from that requirement of 401 (a). A carrier so exempted is safe within the area of the exemption so long as he remains within the external boundary limits of his exemption, as within the walls of a protecting fortress; but without those walls, 401 (a) still rules and its mandate must be obeyed. Hence one departing from the exempted area of operation necessarily comes within the original jurisdiction of 401 (a) which says that all common carrier

operations must be certificated. Common carrier operations without such certificate may be enjoined by a party in interest under 1007 (a). As a defense to the charge brought under 401 (a) for operating as a common carrier without a certificate, the defendant admits common carriage without certificate but says that it is exempt from 401 (a), and pleads and proves the order of exemption, the conditions thereof, and defends its operations thereunder. If defendant has been so exempted and has not transgressed the conditions of its exemption, there is no violation of 401 (a), but if defendant has not acted and is not acting within the exemption, it must necessarily be operating in violation of 401 (a). That it is also operating in violation of the exemption order is merely conclusive proof of violation of 401 (a). Actions beyond the scope of the exemption differ in no way from operations without any exemption at all.

The situation here is, in essence, no different from the situation under the Motor Carrier Act (Part II of the Interstate Commerce Act, 49 U. S. C. 301 et seq.) which authorizes the Interstate Commerce Commission to grant a certificate for special or charter operations over other than regular routes and between fixed termini (Section 207 (a), 49 U. S. C. 307 (a)) and which provides certain exceptions from the prohibition against operating without a certificate (Sections 206 (a) and 203 (b), 49 U. S. C. 306 (a) and 303 (b)). A person operating in excess of his authority as an irregular carrier under Section 207 (a) of that Act is in violation of Section 206 (a) which pro-

hibits motor carrier operations without a certificate of public convenience and necessity. *Interstate Commerce Commission v. Fordham Bus. Corp.*, 38 F. Supp. 739 (S. D. N. Y., 1941). Similarly, a carrier who has not sustained the burden of proving that his operations are within any of the exceptions is guilty of the offense of carrying without a certificate. *United States v. Union Pacific R. Co.*, 20 F. Supp. 665 (S. D. Idaho, 1937); *United States v. Chadwick*, 39 F. Supp. 204 (E. D. Pa., 1940); *United States v. Mertine*, 64 F. Supp. 792 (D. N. J., 1946); *United States v. Krinvic Bros.*, 47 F. Supp. 48 (E. D. Pa., 1942). See also *Spokane & Inland Empire R. R. Co. v. United States*, 241 U. S. 344 (1916).

Recently, on October 5, 1948, in the case of *American Airlines, Inc., v. Standard Air Lines, Inc.*, United States District Court for the Southern District of New York, Civil No. 47-272, Judge Kaufman denied plaintiff's motion for a preliminary injunction to restrain the defendant from violations of the Act similar to those alleged here. Judge Kaufman was apparently of the view that until defendant's letter of registration under Section 292.1 of the Economic Regulations is either suspended or revoked by the Board,⁸ the de-

⁸ Paragraphs (d) (4) and (5) of Section 292.1 of the Economic Regulations provide as follows:

"(4) *Suspension of Letter of Registration*.—Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest.

"(5) *Revocation of Letter of Registration*.—Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provision of the Civil Aeronautics Act of 1938, as amended, or of any order, rule, or regulation issued under any such provision, or of any term, condition, or limitation of any authority issued under said Act or regulations."

fendant, regardless of the scope of his activities, is totally exempt from the provisions of Section 401 (a) of the Act and cannot violate such Section. We believe the motion in that case to have been wrongly disposed of. The letter of registration does not at all mean that its holder is, in fact, within the exemption of 292.1. As shown by appellant's letter of registration (R. 80) the letter is merely an acknowledgement that the carrier has registered with the Board and expressly states that "it is not a certificate of public convenience and necessity," but "merely evidence of registration." Whether or not the holder of such letter is, in fact, an irregular air carrier as defined in Section 292.1 depends entirely on the scope of his operations. Section 292.1 does not exempt a carrier from Section 401 (a) of the Act so long as he holds a letter of registration. Section 292.1 exempts a carrier so long as he holds a letter *provided* he is, in fact, an irregular air carrier. A carrier with an outstanding letter of registration whose operations are not irregular is just as much outside the exemption as a carrier whose letter has been suspended or revoked. It is just as illogical to contend that an irregular air carrier, regardless of the extent of his operations, continues to be within the protection of the exemption so long as his letter of registration is outstanding as it is to say that a certificated carrier operating beyond the scope of his certificate cannot be in violation of the law until the certificate has been suspended or revoked. See *United States v. Chadwick*, 39 F. Supp. 204, 206; *Interstate Commerce Commission v. Fordham Bus Corp.*, *supra*; *Interstate*

Commerce Commission v. Moland Bros. Trucking Co., 62 F. Supp, 921 (D. Minn., 1945); *Consolidated Freightways, Inc. v. United States*, 136 F. (2d) 921 (C. C. A. 8, 1943).

II. The lower Court has original jurisdiction to determine whether appellant's operations have been outside the scope of the exemption provided by Section 292.1

A. Section 1007 (a) of the Act was clearly designed to confer original jurisdiction upon the Court to enjoin any violations of Section 401 (a) upon application of a party in interest

Section 1007 (a) of the Act provides as follows:

If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Authority, its duly authorized agent, or in the case of a violation of section 401 (a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and enjoining upon them obedience thereto."

This Section accomplishes two things. It invests the Board with full power and authority to bring such an

action as this directly with respect to any violation of the Act or any requirement thereunder. See *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 342-343 (1897); *Interstate Commerce Commission v. Fordham Corp.*, *supra*. And it invests a "party in interest" with the same power and authority in "the case of a violation of section 401 (a)." It seems clear that by this provision Congress intended to afford air lines injured by unauthorized competition a speedier and more effective remedy than is provided in Section 1002 (a) of the Act (49 U. S. C. A. 642 (a)), which entitles any person to file with the Board a complaint with respect to anything done in contravention of any provisions of the Act. To apply the doctrine of primary jurisdiction in a Section 401 (a) case, that is, to require prior resort to the Board, would clearly be inconsistent with such intention.

The applicability of the doctrine of primary administrative jurisdiction to facts such as those involved here has been rejected in *Pacific Northern Airlines v. Northern Airlines* and *Pacific Northern Airlines v. Alaska Airlines*, both *supra*. In the *Northern Airlines* case, the court held that it had original jurisdiction to determine whether the operations of the defendant were within the scope of Section 292.1 of the Economic Regulations. The same result was reached in the *Alaska Airlines* case, which involved the question of the court's initial jurisdiction to determine whether the defendant's operations exceeded the exemption provided by Section 292.2 of the Economic Regulations, that is, whether defendant's operations were "casual, occasional, or infrequent," and were "not

made in such manner as to result in establishing a regular or scheduled service.” In that case, the Court said:

Full consideration has been given to the arguments of counsel for the defendant on the doctrine of primary jurisdiction illustrated in *Texas and Pacific Railway Company v. Abilene Cotton Oil Company*, 204 U. S. 426 (1907), which would deny to the Court the authority to grant any relief to the plaintiff and intervenors in this action. But the language used in the Act appears to commend the contrary result. The circumstantial detail with which the Act was written requires the conclusion that if Congress had desired the Courts not to intervene in circumstances such as have been presented in this case, appropriate language would have been used to that end. The Act which controls here was enacted by a Congress which must have had ample knowledge of the doctrine mentioned. Evidently the same conclusion was arrived at in the Hawaiian Airlines case hereinbefore cited. That view is not shaken by the decisions given in *Adler v. Chicago & Southern Air Lines, Inc.*, D. C. Mo. 1941, 41 F. Supp. 366, and other similar cases, which rightly uphold the primary jurisdiction doctrine on the facts there disclosed.

See also *Flying Tiger Line, Inc., et al. v. Atchison, Topeka and Santa Fe Ry. Co.*, 75 F. Supp. 188 (S. D. Cal., 1947).

The decisions in these cases are indubitably correct. Section 1007 (a) applies to any violations of Section 401 (a). It makes no distinction between violations resulting from operating without any authority at all

or violations resulting from operating in excess of authority. Congress authorized the drastic remedy of the injunction in Section 401 (a) cases in order to protect air lines against injuries from unauthorized competition. If air lines could not invoke this remedy to prevent excessive operations by irregular air carriers, they would lose the protection afforded by such remedy where it is most needed.

There has never been any doubt under similar provisions authorizing direct court actions that the courts have jurisdiction to decide many questions of at least equal complexity with the question involved here and questions which would otherwise be decided by the agency dealing with the general subject matter. For example, Section 1 (20) of the Interstate Commerce Act (49 U. S. C. 1 (20)), provides that any construction of a railroad extension without a certificate of public convenience and necessity from the Interstate Commerce Commission "may be enjoined by any court of competent jurisdiction at the suit of * * * any party in interest." Under that provision, which apparently served as a pattern for Section 1007 (a), *Flying Tiger Line, Inc., et al. v. Atchison, Topeka and Santa Fe Ry. Co., supra*, at p. 192, the courts have assumed jurisdiction to decide such technical issues as whether the particular track was an industrial spur rather than an extension of a railroad or whether the extension was a railroad engaged in intra-state operations only, without waiting for those questions to be presented to and determined by the Commission. *Texas & Pacific Railway Co. v. Gulf, Colorado &*

Santa Fe Railway Co., 270 U. S. 266 (1926); *Smyth v. Asphalt Belt Ry., Co.*, 267 U. S. 326 (1925). Another example is Section 222 (b) of the Motor Carrier Act (49 U. S. C. 322 (b)) which confers jurisdiction upon the district courts on application of the Commission to enjoin any motor carrier from operating "in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder." Under that provision, too, the courts have consistently resolved complicated issues of fact and law in order to determine what are irregular operations, what operations fall within the various exceptions, and whether particular carriers are private, contract, or common carriers without waiting for a prior determination of such questions by the Commission itself. E. g., *Interstate Commerce Commission v. Fordham Bus Corp.*, *supra*; *Georgia Truck System, Inc., v. I. C. C.*, 123 F. (2d) 210 (C. C. A. 5, 1941); *I. C. C. v. Tank Car Oil Corp.*, 60 F. Supp. 133 (N. D. Ga., 1945), *aff'd* 151 F. (2d) 834 (C. C. A. 5, 1945); *A. W. Stickle & Co. v. I. C. C.*, 128 F. (2d) 155 (C. C. A. 10, 1942), *cert. den.* 317 U. S. 650 (1942); *I. C. C. v. Dunn*, 166 F. (2d) 116 (C. C. A. 5, 1948). Even under Section 222 (a) of the Motor Carrier Act (49 U. S. C. 322) which provides a criminal penalty for violations of that Act, courts have consistently decided, as an original matter, such questions as what constitute "terminal operations" and what operations fall within the exceptions for agricultural commodities or bona fide taxicab

service. See, e. g., *United States v. Motor Freight Express*, 60 F. Supp. 288 (D. N. J., 1945);⁹ *United States v. Chadwick*, 39 F. Supp. 204 (E. D. Pa., 1940); *United States v. Krinvic Bros.*, 47 F. Supp. 481 (E. D. Pa., 1942); *United States v. Mertine*, 64 F. Supp. 792 (D. N. J., 1946). See, also, *McDonald v. Thompson*, 305 U. S. 263 (1938).

In view of the foregoing, we believe that it is clear from the language and purpose of Section 1007 (a) that the lower court had original jurisdiction to determine whether the appellant's operations have ex-

⁹ In this case a criminal information was filed alleging that the defendant had operated beyond the authority of its certificate of public convenience and necessity. The defendant contended that the alleged unauthorized operations were in effect "terminal operations" which did not require any specific authority and that the Commission had made no specific finding as to the scope of the defendant's particular terminal area. The court found the defendant guilty and stated as follows (at p. 296):

"Finally, it is urged that the meaning of the statute and administrative regulations thereunder upon which the information is based are at present so lacking in that measure of reasonable certainty and clarity that a conviction of the defendant on the facts involved herein would be a denial of due process of law under the Fifth Amendment of the Constitution of the United States. * * *

"We feel that the boundary line beyond which it was illegal for defendant to operate had reasonably clear definition. The defendant operated outside of it at its peril. When agitated by the prospect of prosecution it sought, through the conventional course, to have the Interstate Commerce Commission make a determination consonant with its idea of its proper area of operation. It should have done so before it performed the transactions alleged in the information. That it did so afterward and the general trivial nature of defendant's acts of which complaint are made, when compared with its scope of operation, cannot be held to exculpate defendant of guilt, but go rather to the mitigation of the penalty which defendant has incurred."

ceeded those authorized by Section 292.1 of the Economic Regulations. In *American Airlines, Inc. v. Standard Air Lines, Inc.*, *supra*, Judge Kaufman came to a contrary conclusion apparently for the reasons that the provisions of Section 292.1 for the suspension and revocation of letters of registration provide an exclusive remedy for alleged excessive operations by the holder of such letter and that since the Board alone can create and terminate defendant's exemption from Section 401 (a), only the Board can determine and prohibit operations in excess of such exemption. It is true that the Board has exclusive jurisdiction to suspend and revoke a letter of registration as well as to grant one. But that fact is immaterial to the question whether the court has original jurisdiction to determine and prohibit operations in excess of the exemption. The suspension and revocation provisions were designed to terminate the authority of the irregular air carrier to engage in *any* air transportation for reasons of public interest or for knowing and wilful violation of any provision of the Act or any requirements thereunder. They were not designed simply to compel an irregular air carrier to stay within the scope of his exemption. The remedies designed to accomplish that result are the cease and desist order by the Board and an injunction by a district court, or both. Section 401 (h) of the Act (49 U. S. C. 481 (h)) similarly confers exclusive jurisdiction upon the Board to suspend a certificate if the public interest so requires and to revoke such certificate for intentional failure to comply with any provision of the Act or any re-

quirements thereunder. Certainly, it cannot be contended that just because the Board alone has jurisdiction to grant and suspend or revoke a certificate, the Board alone has jurisdiction to determine whether a certificated carrier operates beyond the scope of its authority. Such a result would be preposterous and would in large part nullify the provision of Section 1007 (a) with respect to Section 401 (a) cases.¹⁰

The function of a court upon application for an injunction under Section 1007 (a) of the Act to restrain unauthorized operations is quite different from that exercised by the Board when it grants or suspends or revokes a certificate of public convenience and necessity or a letter of registration. The latter situation requires the exercise of administrative discretion and is therefore within the exclusive jurisdiction of the Board. The function of the court in a

¹⁰ See *United States v. Chadwick*, *supra*, where the Court said at p. 206:

“As to the defendant’s second contention—that possession of a certificate of convenience in one part of the United States gives him complete immunity on the criminal side in operating without a certificate elsewhere in the United States:

“To so hold would make a mockery of the Motor Carrier Act. A reading of the Act nowhere discloses any intention on the part of Congress to grant such immunity from criminal prosecution to the holders of certificates of public convenience. Defendant in effect would have the courts construe possession of even the most limited certificate of convenience anywhere in the United States as an immunity warrant for violation of the Motor Carrier Act elsewhere over the length and breadth of the United States—since, under the defendant’s theory, the holder of a certificate, no matter how limited the area covered, could violate this Act in every section of the country and still remain free from criminal prosecution.”

suit under 1007 (a) by a proper party is merely to determine whether the defendant has in fact engaged in unauthorized operations, and if so, to grant appropriate relief. As stated in *Texas and Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, *supra* (at p. 273):

The function of the Court upon an application for an injunction under paragraph 20 is a very different one from that exercised by the Commission when, having taken jurisdiction under paragraphs 19 and 20, it grants or refuses a certificate. The function confided in the Commission is comparable to that involved in a determination of the propriety or application of a rate, rule or practice. It is the exercise of administrative judgment. Where the matter is of that character, no justiciable question arises ordinarily until the Commission has acted. Compare *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 295. The function of the Court upon the application for an injunction is to construe a statutory provision and apply the provision as construed to the facts. The prohibition of paragraph 18 is absolute. If the proposed track is an extension and no certificate has been obtained, the party in interest opposing construction is entitled as of right to an injunction.

B. Aside from the clear language and intent of Section 1007 (a), the doctrine of primary jurisdiction is not applicable to the question whether appellant's operations have been in excess of those permitted by Section 292.1 of the Economic Regulations

Under the doctrine of primary jurisdiction the courts will not determine a question within the juris-

diction of an administrative tribunal prior to the decision of the tribunal where the question demands the exercise of administrative discretion requiring the special knowledge and experience of the administrative tribunal. *Doctrine of Primary Administrative Jurisdiction*, 42 Am. Jur. pp. 698-702. Specifically, the doctrine of primary jurisdiction applies to such questions as the reasonableness of a rate or the fairness of a rule or a practice. See, e. g., *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907); *Mitchell Coal Co. v. Penn. R. R. Co.*, 230 U. S. 247 (1913); *United States Navigation Co. v. Cunard Steamship Co.*, 283 U. S. 474 (1932); *Adler v. Chicago and Southern Air Lines, Inc.*, 41 F. Supp. 366 (E. D. Mo., 1941).

The doctrine is not applicable where the issue, regardless of its complexity, is not the reasonableness of the rate or rule but a violation of such rate or rule. *Penna. R. R. v. Puritan Coal Co.*, 237 U. S. 121 (1915); *Penna. R. R. Co. v. Stineman Coal Mining Co.*, 242 U. S. 298, 300 (1915); *Barrett v. Gimbel Bros.*, 226 Fed. 623, 631 (C. C. A. 3, 1915); *Murray Co. et al. v. Gulf Coast and Santa Fe Ry. Co. et al.*, 59 F. Supp. 366 (N. D. Tex., 1945). Innumerable cases hold that courts have original jurisdiction to interpret tariffs, rules, and practices where the issue is one of violation rather than reasonableness. *W. P. Brown & Sons Lumber Co. et al. v. Louisville & Nashville Ry. Co. et al.*, 299 U. S. 393 (1937); *Burrus Mill and Elevator Co. v. Chicago, R. I. & P. Ry. Co.*, 131 F. (2d) 532 (C. C. A. 10, 1942); *Penna. R. R. v. Puritan Coal Mining Co.*, 237 U. S. 121, 134 (1915); *Penn-*

sylvania Railway Co. v. Clark Bros. Coal Mining Co., 238 U. S. 456 (1915); *Louisville and Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70 (1911); *Great Northern Railway Co. v. Merchants Elevator Company*, 259 U. S. 285 (1922); *United States v. Metropolitan Lumber Co.*, 254 Fed. 335 (D. N. J., 1918). When the administrative tribunal has "promulgated a rate which must be applied and where the only question is whether the commodity referred to in the rate is the commodity in question, then there is presented a factual question in nowise differing from any other fact issue determinable by courts and juries. Courts have original jurisdiction to try such issues." *Murray Co. et al. v. Gulf Coast and Santa Fe Ry. Co. et al.*, *supra*. As stated in *United States v. Metropolitan Lumber Co.*, *supra* (at p. 347):

It is further urged that the defendants cannot be prosecuted in the absence of proceedings before a previous action by the Interstate Commerce Commission. This proposition seems to be based on two theories. It is first claimed that the embargo should have been submitted to the Interstate Commerce Commission, and its reasonableness ascertained and adjudicated by that body. The obvious answer is that the reasonableness of the embargo is not in issue in these cases; but the question is whether they have knowingly received a discrimination or concession in transportation service which a strict and impartial enforcement of the embargo would not have permitted them to receive. If the railroad company were being prosecuted for having given, or the defendants for having received, discriminations by means of or

through the embargo rather than by violating it, in all probability the defendant's contention would be well taken, for in such a case the question would be whether the embargo was reasonable, or whether it produced unjust and unreasonable discrimination among shippers. In that event an administrative question would probably be presented, which, under the decisions of the Supreme Court, must be passed on by the Interstate Commerce Commission prior to the institution of either criminal or civil proceedings.¹¹

Under the circumstances, we fail to see how the doctrine of primary jurisdiction could be applicable here. The question whether a carrier has violated Section 401 (a) has very little resemblance to the question of the reasonableness of a rate or practice and it may be for that reason that Congress conferred power to bring a direct court action in a 401 (a) case not only upon the Board but also upon any party in interest. Section 401 (a) contains an absolute prohibition against unauthorized air transportation. There is no question of reasonableness or administrative discretion involved in a suit to enjoin a violation of such Section. The Court merely has to decide whether air transportation operations have been conducted without any authority at all or in

¹¹ See, also, *Danciger v. Wells, Fargo & Co.*, 154 Fed. 379 (W. D. Mo., 1907), and *Royal Brewing Co. v. M. K. T. Ry.*, 217 Fed. 146 (D. Kan., 1914), where it was held that the question whether a carrier is required to receive and transport a certain commodity tendered to it for shipment is within the jurisdiction of the courts and need not first be determined by the Interstate Commerce Commission.

excess of authority.¹² It may be admitted that the question whether defendant's operations have exceeded in frequency and regularity those permitted by Section 292.1 is more difficult than the question whether a carrier had any authority at all. But that does not mean that primary jurisdiction to decide such question is with the Board. As has already been demonstrated, the courts have in many cases decided questions at least as difficult without first waiting for such questions to be determined by the administrative tribunal involved. See, *supra*, pp. 21-23.

Finally, even assuming that the question of the limits of permissible operations under Section 292.1 would otherwise present a proper case for application of the primary jurisdiction rule, such rule should not be invoked here. It is established that where the administrative tribunal, in the exercise of its discretion, had already passed upon a given issue or determined the meaning of a tariff or rule in one proceeding, courts may proceed to decide the same question in subsequent proceedings without further recourse to that tribunal. *Crancer et al. v. Lowden et al.*, 315 U. S. 631 (1942); *Penna. R. R. Co. v. Stineman Coal Mining Co.*, *supra*;

¹² Compare *Penna. R. R. v. Puritan Coal Co.*, *supra*, where the Court said (at pp. 131-132) :

"But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage."

Murray Co. et al. v. Gulf Coast and Santa Fe Railway Co. et al., *supra*; *National Pole Co. v. Chicago and Northwestern Ry. Co.*, 211 Fed. 65 (C. C. A. 7, 1914); *Great Northern Ry. Co. v. Armour & Co.*, 26 F. Supp. 964 (N. D. Ill. 1939). As already shown, *supra*, pp. 9-12, the Board has evolved a standard for determining the extent of operations permitted under Section 292.1. Therefore, no purpose would be served in requiring any further determination by the Board. If the question calls for the exercise of administrative discretion, that discretion has already been exercised.¹³

¹³ In *American Airlines, Inc., v. Standard Airlines, Inc.*, *supra*, Judge Kaufman expressed the fear that "serious chaos and conflict with the Board" might result if the courts were to decide this question. We believe that Judge Kaufman's fear is unfounded. In most cases, certainly, consistency with Board determinations may be achieved by the application of the standard promulgated by the Board. It is true that in a marginal case there is a possibility of a conflict in decision. But that possibility exists in any situation of concurrent jurisdiction or concurrent remedies. The same contention was made in *Great Northern Railway v. Merchants Elevator Co.*, *supra*. Justice Brandeis rejected the argument as "unsound." He said at (p. 290) :

"This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of federal law. If the parties properly preserve their rights, a construction given by any Court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari, and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission."

It would certainly be futile to require a further determination by the court in this case. The appellant operated a regular scheduled daily service; consequently, by any standard, its operations were outside the exemption of Section 292.1.¹⁴

¹⁴ In the introductory statement in its brief (pp. 6-7) appellant urges, "in further fortification of the primary jurisdiction of the Board," that appellee, subsequent to the filing of the complaint herein, had intervened in the proceeding before the Board on appellant's application for a certificate of public convenience and necessity and had alleged in its petition for intervention that appellant was operating a regularly scheduled air carrier service between points within the Territory of Hawaii in violation of the Act (R. 81-83). It is clear that the nature and purpose of appellee's intervention in the proceeding before the Board are entirely different from the nature and purpose of the action here. Appellee intervened to oppose appellant's application for a certificate and not to seek relief from the Board against appellant's unauthorized operations. Even if the nature or purpose of the two proceedings were similar, it would not affect the jurisdiction of the lower court in this case. Section 1007 (a) provides a remedy which is independent of, and in addition to, any administrative remedy available to plaintiff. There is nothing in the Act to prevent plaintiff from pursuing both remedies simultaneously. As stated in the *Flying Tiger* case, *supra* (at p. 195), "Any person can file a complaint with the Board, or any person who is a party in interest may, if he desires, file an action in court under the limitations of section 647 (a) of Title 49 (section 1007 (a) of the Act). In fact, I see nothing in the Act which would prevent the taking of both procedures at the same time if a person thought it necessary." If Congress had intended that the two remedies should be alternative rather than cumulative, it would have said so expressly. See, e. g., Section 306 of the Packers and Stockyards Act, 7 U. S. C. 209; Section 9 of the Interstate Commerce Act, 49 U. S. C. 9; Section 308 (c) of the Interstate Commerce Act, 49 U. S. C. 908 (c).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and order of the District Court are in all respects proper and should be affirmed.

EDWARD DUMBAULD,

WILLIAM D. MCFARLANE,

Special Assistants to the Attorney General,

Department of Justice, Washington, D. C.

EMORY T. NUNNELEY, JR.,

General Counsel, Civil Aeronautics Board.

HERBERT A. BERGSON,

Assistant Attorney General.

FRANK J. HENNESSY,

United States Attorney.

JOHN H. WANNER,

Assistant General Counsel,

Civil Aeronautics Board.

OLIVER CARTER,

*Acting Chief, Enforcement and Litigation
Section,*

Civil Aeronautics Board.

ROBERT BURSTEIN,

GILBERT E. ANDREWS,

Attorneys, Civil Aeronautics Board.

APPENDIX

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 973, 49 U. S. C. 401 *et seq.*) are as follows:*

Section 1. As used in this Act, unless the context otherwise requires—

(2) “Air carrier” means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: * * *

(10) “Air transportation” means interstate, overseas or foreign air transportation * * *

(21) “Interstate air transportation” * * * mean(s) the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce * * *

(a) * * * between places in the same territory * * * of the United States * * * whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation. (52 Stat. 973, 49 U. S. C. 401).

Section 401 (a). No air carrier shall engage in any air transportation unless there is in force a certificate

*The functions of the Authority in connection with, *inter alia*, economic regulations of air transportation were transferred to the Civil Aeronautics Board by Reorganization Plan No. IV. (See, *supra*, note 2, p. 2.) Accordingly, the term “Board” should be substituted for “Authority” in all statutory references thereto.

issued by the Board authorizing such air carrier to engage in such transportation * * * (52 Stat. 987, 49 U. S. C. 481 (a)).

Section 416 (b) (1). The Board, from time to time and to the extent necessary, may * * * exempt from the requirement of this title (IV) or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier, or class of air carriers, if it finds that the enforcement of this title or such provisions, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest. (52 Stat. 1005, 49 U. S. C. 496 (b)).

Section 1007. (a) If any person violates any provision of this Act, or any rule, regulation, requirement or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Authority, its duly authorized agent, or, in the case of a violation of section 401 (a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and

enjoining upon them obedience thereto. (52 Stat. 1025, 49 U. S. C. 467 (a)).

Section 292.1 of the Board's Economic Regulations, effective June 10, 1947 (12 Fed. Reg. 3076-3079) is set forth in the Appendix to the Appellant's brief at pages i to x. The "Explanatory Statement on Revision of Section 292.1 of the Economic Regulations" and the findings which accompanied said Section 292.1 of the Economic Regulations at the time of its adoption are as follows:

EXPLANATORY STATEMENT

Attached is the Revision of Section 292.1 of the Board's Economic Regulations governing Non-Certificated Irregular Air Carriers, to become effective June 10, 1947. In order to facilitate a general understanding of the attached Regulation, and for that limited purpose only, the following statement is offered:

Title IV of the Civil Aeronautics Act contains provisions pertaining to the economic regulation of air carriers.¹ Section 401 of this Title provides that no air carrier may engage in air transportation² unless there is in effect a certificate of public convenience and necessity issued by the Board authorizing it so to engage. Other sections of this Title

¹ "Air Carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation.

² "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft. "Interstate air transportation," "overseas air transportation," and "foreign air transportation," respectively, mean the carriage by aircraft of persons or property *as a common carrier for compensation or hire* or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States.

provide certain additional requirements for air carriers, such as, for example, the filing of tariffs setting out rates and charges (Sec. 403) and the filing of reports (Sec. 407).

Section 416, however, permits the Board under certain circumstances to exempt from most of the requirements of Title IV certain air carriers or groups of air carriers. Under this prerogative the Board has in the past, in Section 292.1 of its Economic Regulations, exempted those air carriers engaged solely in non-scheduled operations from the requirement of a certificate of public convenience and necessity and from practically all other provisions of Title IV. Generally, those same nonscheduled air carriers would be classed, under the attached Regulation, as Irregular Air Carriers and would continue to be exempt from the requirement of

or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States; and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

It will be noted from the foregoing definition that one of the attributes of an air carrier is that it be a common carrier. A test of common carriage frequently applied is whether the carrier holds itself out to the public as engaged in the business of carrying persons or property and that it will, so long as it has room, carry persons or property coming or brought to it for that purpose. Common carriage would not ordinarily include flight instruction, personal pleasure flying, flying in connection with one's own business, etc. A further description of the term is contained in the explanatory statement attached to Part 42 of the Civil Air Regulations.

a certificate of public convenience and necessity while being made subject to many other requirements from which they were previously exempted.

As will be seen from paragraphs (a) and (b) of the attached Regulation, Irregular Air Carriers include only those carriers which (1) do not hold a certificate of public convenience and necessity;³ (2) do not operate within Alaska;⁴ (3) are not Alaskan Air Carriers;⁵ (4) are not operating pursuant to some other Board exemption.⁶

These carriers may not, after September 10, 1947, carry persons in foreign air transportation, and may not conduct service between any points with regularity or a reasonable degree of regularity. As to whether any particular operation might be deemed to be irregular within the meaning of this Regulation, reference is made to the Board's discussions of the matter in its decisions in the *Page* and *Trans-Marine*

³ The issuance of an air carrier operating certificate pursuant to Part 42 of the Civil Air Regulations (pertaining to "safety" requirements) does not constitute an air carrier a "certificated air carrier," nor does any other kind of certificate except a certificate of public convenience and necessity as provided for in section 401 of the Act.

⁴ This does not preclude operations by Irregular Air Carriers as between one or more points in Alaska, on the one hand, and a point or points in other United States territories or possessions or in the continental United States on the other.

⁵ Covered by Section 292.2 of the Economic Regulations.

⁶ The Board is simultaneously issuing Section 292.5 of the Economic Regulations establishing a class of air carriers, known as Noncertificated Cargo Carriers, open only to certain active air cargo carriers, which had on file with the Board prior to May 5, 1947, applications for certificates of public convenience and necessity to carry cargo only. A carrier operating as a Noncertificated Cargo Carrier under Section 292.5 could not also operate as an Irregular Air Carrier under Section 292.1.

cases, Dockets 1896 and 1967, respectively, and its *Investigation of Nonscheduled Air Services*, Docket 1501. In addition, an order consented to by the carrier was approved and entered by the Board in *Matter of the Noncertificated Operations of Trans-Caribbean Air Cargo Lines, Inc.*, Docket 2593, from which further guidance as to the extent of permissible operations may be obtained.⁷

The word "point" is defined as an airport and all territory in a 25-mile radius. Thus, for example, service to or from LaGuardia Airport, Newark Airport, Floyd Bennett Field, Roosevelt Field, or Teterboro Airport, on the one hand, and Washington National Airport, on the other, would be considered as one service and a pattern of regularity of operations would not be affected by alternating use of the airports in

⁷ Paragraph 3 of this consent order provides that the carrier cease and desist from operating flights in air transportation between any points "* * * (b) regularly or with a reasonable degree of regularity, which regularity is reflected by the operation of a single flight per week on the same day of each week between the same two points, or is reflected by the recurrence of operations of two round trip flights, or flights varying from two to three or more such flights, between any same two points each week in succeeding weeks, without there intervening other weeks or approximately similar periods at irregular but frequent intervals during which no such flights are operated so as thereby to result in appreciable definite breaks in service: it being intended by this subparagraph to require irregularity in service between any such points but not to preclude the operation of more than one or two such flights in any given week, nor to prescribe any specific maximum limitation upon the number of flights which may be performed in any one week, if infrequency and irregularity of service is otherwise achieved through variations in numbers of flights and intervals between flights and through frequent and extended definite breaks in service * * *"

Similar provisions also have been included in cease and desist orders entered as to Willis Air Service, Inc., Docket No. 2639, and Trans-Luxury Airlines, Inc., Docket No. 2589.

the New York area. The Regulation also provides that these carriers may not conduct regular service within any point; that is, as between LaGuardia Airport, Newark Airport, Floyd Bennett Field, etc.⁸

There are probably certain types of service which appear to lend themselves to noncertificated air carrier operations and yet which, due to their very nature, might tend to be conducted with a regularity in excess of that permitted by the Regulation. Such might be the case as to so-called "air tours" or "all expense tours," conducted, for example, each week end to some resort region. A person desiring to conduct such service would not be prevented by this or any other regulation, however, from applying to the Board for a certificate of public convenience and necessity under section 401 of the Act or for an appropriate exemption under section 416 of the Act.

With regard to the exemptions extended to Irregular Air Carriers by this Regulation there is a distinction made between such carriers according to the weight of the aircraft which they utilize in *air transportation*.⁹ As set out in subparagraph (c) (2) greater exemptions are extended to those Irregular Air Carriers which do not utilize in air transportation any single aircraft having a gross take-off weight over 10,000 pounds, or three or more aircraft (not including those under 6,000 pounds) whose aggregate gross take-off weight exceeds 25,000 pounds.

These carriers utilizing smaller aircraft must meet only the following requirements of the

⁸ Without disclaiming jurisdiction over sightseeing operations, the Board does not deem this provision to prohibit regular local sightseeing operations, which take off and land only at the same airport.

⁹ This would not include aircraft utilized solely in connection with such other operations as flight training, private plane rentals, crop dusting, etc.

Civil Aeronautics Act: (1) Maintain certain prescribed rates of compensation, maximum hours and other working conditions for airmen (subsection 401 (1)); (2) Provide safe service, equipment and facilities (subsection 404 (a)); (3) File such reports and maintain records and accounts in such form as may be required by the Board ¹⁰ (subsections 407 (a), (d)) and to give the Board access at all times to accounts, records, documents, correspondence, etc. (subsection 407 (e)); (4) Refrain from engaging in any unfair or deceptive practices or unfair methods of competition (section 411); (5) Be subject to Board inquiry into the management of the business of the carrier (section 415). Furthermore, no officer or director of such a carrier may profit in any way from the negotiation or sale of any of the securities issued by the carrier (subsection 409 (b)).

Should one of these carriers begin using, in its air transportation, services that would result in removing it from the category of an operator of small aircraft, it is required to notify the Board immediately, and thereafter would have the additional obligations imposed on Irregular Air Carriers operating large equipment.

The requirements of the Act to which Irregular Air Carriers operating larger equipment are subjected, as set out in subparagraph (c) (1) of the Regulation, are more extensive. Particular attention is directed to the requirement of section 403 of the Act that carriers publish and file with the Board tariffs showing individual and joint rates, fares, classifications and practices in connection with their services and that such tariffs be observed. Tariff filings must conform to the requirements of Section 224.1 of the

¹⁰ No reporting or accounting requirements had been established for these carriers by the date of this Regulation. Such requirements as are subsequently established will be distributed to all carriers registering under the regulation.

Board's Economic Regulations; however, this section provides for waiver of particular requirements on application, in the event, for example, that the peculiar characteristics of a carrier's services render it impossible for it to comply with the general requirements; section 403 also specifies persons to whom free or reduced rate transportation may be issued without violation of the Act.

In addition, these carriers utilizing large equipment are required to file quarterly operational reports to reflect the extent and character of their activities as provided in subparagraph (c) (6) of the Regulation.

With respect to such exemptions as have been granted to all Irregular Air Carriers regarding sections 408, 409 and 412 of the Act, it should be pointed out that one of the effects of Board approval of filings under these sections is to relieve the parties thereto from the operation of the so-called "antitrust" laws. By exempting the carriers to some extent from the requirement of filing under these sections, the Board has not thereby suspended the operation of the antitrust laws. There is nothing, however, to prevent a carrier desiring relief from such laws with respect to any arrangement otherwise fileable from making an appropriate filing, even though not required by this Regulation to do so. Board approval thereof, if obtained, would effect the desired relief.

As provided in paragraph (d) of the Regulation, Irregular Air Carriers, in order to enjoy the benefits of the exemptions granted, are required to register with the Board and to hold an effective Letter of Registration. For the carrier's convenience in registering, appropriate forms are attached to the Regulation.

Because Irregular Air Carriers have not heretofore been subjected to economic regulations of the extent prescribed in the revised Section 292.1, and therefore may be unfamiliar

with such regulation, it is important that all such carriers acquaint themselves to the greatest degree possible not only with all pertinent provisions of the Civil Aeronautics Act, but also with the Board's Economic Regulations issued thereunder. Accordingly, there is set out below, for information purposes only, a list of Economic Regulations, one or more of which are applicable to all Irregular Air Carriers, showing the sections of the Act under which they were promulgated. These regulations, together with copies of the Civil Aeronautics Act of 1938, as amended, are obtainable at nominal cost from the Superintendent of Documents, Government Printing Office, Washington, D. C. Regulations prescribing reporting and accounting requirements under section 407 (a) and (d) will be forthcoming in the near future.

Section of act	Section of Econ. Reg.	Subject
403-----	224.1-----	Filing of Tariffs.
	228.4-----	Free or Reduced Rate Transportation.
407-----	280.1-----	Stock Ownership Reports by Officers and Directors.
	280.2-----	Stock Ownership Report by Air Carrier Affiliates.
409-----	248.1-----	Approval of Interlocking Relationship.
412-----	251.1-----	Filing of Intercarrier Agreements.
605-----	228.3-----	Access to Aircraft.
1002-----	285-----	Rules of Practice Before Board.

FINDINGS

The Civil Aeronautics Board, having held a hearing and issued its opinion in the Investigation of Non-Scheduled Air Service, Docket No. 1501, relating to noncertificated air carriers,¹¹ having circulated for comment a draft

¹¹ As used herein the term "noncertificated air carriers" refers to air carriers engaging in air transportation which do not hold certificates of public convenience and necessity issued by the Board, and the term "certificated air carriers" refers to air carriers which do hold such certificates.

and thereafter a revised draft of proposed regulation relating to noncertificated air carriers, having considered written comments and oral argument thereon in Docket No. 2742, and having also considered other data and information¹² available to the Board, finds as follows:

1. Since 1938 there has been in effect an exemption regulation adopted by the Board which exempts noncertificated air carriers from all provisions of Title IV of the Civil Aeronautics Act (other than sections 401 (1) and 407 (a), and, since June 1946, section 411) so long as they engage only in irregular services as defined in such regulation. At the time such regulation was originally adopted the Board believed it was undesirable to provide for the detailed economic regulation of the operations of such carriers without further study. Since that time and particularly following the close of the war, the Board has accumulated information and data which indicate that the aggregate operations of such carriers have increased in scope and importance, and that operations by individual carriers are frequently extensive. Some such operations have been conducted with little regard to the responsibility and duty owed to the public by a common carrier with respect to service, and have resulted in numerous complaints to the Board concerning tariff and operating practices, including but not limited to failure of such carriers to perform the service agreed upon, great variations in the fares and

¹² Such data and information include, among other things, the reports heretofore filed with the Board pursuant to Section 292.1 of the Economic Regulations, data obtained in investigations made by the enforcement staff of the Board, financial Forms 41, 2380, and 2780, and other reports filed with the Board by the certificated air carriers, informal complaints filed against non-certificated air carriers, and applications for air carrier operating certificates filed with the Civil Aeronautics Administration pursuant to Part 42 of the Civil Air Regulations.

rates charged by the same carrier for comparable service, failure to make refunds to passengers and shippers for transportation not performed, misrepresentation of equipment, facilities and services, and use of inadequate and makeshift equipment and facilities. Both the protection of the public from improper practices by such noncertificated air carriers and protection of the certificated carriers against unregulated competition require that additional regulatory provisions of the Civil Aeronautics Act be now made applicable to such noncertificated air carriers.

2. In addition to the public demand and need for air-transportation services furnished by the certificated air carriers on regularly scheduled operations, there is public demand and need at the present time for air services on an irregular basis both to certificated and noncertificated points. Such irregular services vary greatly with respect to type of service, and fill a need which, because of fluctuations in the demand and the impossibility of determining where and when the demand will arise, by its very nature cannot be fulfilled economically by carriers operating on regular schedules and routes. Such services can be performed by noncertificated air carriers, and because of their knowledge of local conditions or willingness to perform specialized types of services such services can frequently be performed by them more adequately, economically and quickly than by certificated carriers. To require the certification of such carriers at the present time would be impracticable because it would be necessary to issue a certificate of public convenience and necessity which would either impose no substantial limitations upon operations or which would substantially reduce the flexibility and usefulness of the operations of such carriers. Certification, in the case of many small-scale operations, would be uneconomical and would tend to prevent or re-

tard the development of new types of services designed to meet special conditions. Because of the fact that irregular services meet a different need and must be infrequent and irregular, such services, if properly regulated under provisions of the Act other than those relating to certificates of public convenience and necessity, will not under present conditions have adverse competitive effect upon the services performed by the certificated air carriers.

3. In view of the considerations mentioned in paragraphs 1 and 2 hereof, and in order to insure the flexibility in the conduct of irregular services which is implicit in exemption of non-certificated air carriers from certification, Irregular Air Carriers, as defined in Section 292.1 below, should continue to be exempted from the requirements of section 401 of the Act other than subsection (1). Protection of the public and the orderly development of the air transportation system in accordance with the objectives of section 2 of the Act, however, require that certain provisions of the Act which are not directly related to the certification provisions of the Act should be made applicable to the Irregular Air Carriers utilizing equipment of substantial size. Such carriers are now subject to sections 401 (1), 407 (a) and 411, and these requirements should be continued. In addition, such carriers should now be made subject to sections 403, 404 (b), 407 (b), 407 (c), 407 (d), 407 (e), 409 (b), 410, 415 and 416; and to the requirements of section 404 (a) relating to safe service, equipment and facilities. In addition, such carriers should be made subject to the provisions of sections 408, 409 (a), 412, 413 and 414, except to the extent, as more fully set forth in paragraph (c) of Section 292.1 below, that such provisions involve other Irregular Air Carriers.

4. A portion of the irregular air service now being performed is performed by small air car-

riers operating a limited number of planes of small size. From reports submitted to the Board it appears that noncertificated air carriers operating one or more aircraft having a gross take-off weight in excess of 10,000 pounds constituted less than 20 percent of the total number of noncertificated air carriers, but flew approximately 90 percent of the total revenue passenger miles flown by all such carriers. It would thus appear that Irregular Air Carriers operating aircraft under 10,000 pounds may be subjected to a much lesser degree of economic regulation without materially affecting the overall air transportation system. Such operations are limited in scope, do not represent a serious threat to certificated operations, and extensive regulation thereof at this time would be unduly burdensome and costly to such carriers, would tend to increase the cost and impair the value of such services to the public, and would impose unnecessary additional administrative burden upon the Board. Accordingly, such Irregular Air Carriers should not be made subject to sections 403, 404 (b), 407 (b), 407 (c), 408, 409 (a), 410 and 412, but should be made subject to all other provisions of the Act to which the Irregular Air Carriers utilizing equipment of substantial size are subject.

In drawing the line between the Irregular Air Carriers utilizing equipment of substantial size and the Irregular Air Carriers which utilize only smaller equipment, the Board finds that the use of a single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds would involve an operation of substantial size in relation to the service offered to the public and the competitive effect upon other air carriers; and that the use of aircraft units having an allowable gross take-off weight between 6,000 and 10,000 pounds and an aggregate gross take-off weight in excess of 25,000 pounds would likewise involve a substantial operation.

5. Section 292.1 of the Economic Regulations as revised herein, unlike the exemption heretofore in effect does not provide for exemption from the Act with respect to the carriage of persons in foreign air transportation. The Board finds that notwithstanding the findings in paragraphs 2 and 3 hereof the continuation of the exemption with respect to such transportation is no longer justified in view of the recent substantial extension of our international air transportation system, as well as the recent award of foreign air carrier permits, and in view of smaller traffic potential which the Board finds to exist in the field of international air transportation as compared with interstate and overseas air transportation.

6. As a condition to the grant of the exemptions provided for in Section 292.1 below, such section will provide for letters of registration to be issued to Irregular Air Carriers, for quarterly operation reports, and for special reports on the institution of service with large aircraft by such carriers theretofore utilizing only small aircraft. These requirements are deemed necessary in order that the Board may maintain adequate supervision and obtain information with respect to exempted operations.

7. Unless specific provision were made herein the officers and directors of Irregular Air Carriers otherwise would be subject to the interlocking relationships provisions of section 409 of the Act, even though the Irregular Air Carriers in which they hold their positions are wholly or partially exempted from such provisions by the terms of Section 292.1 below. The Board's statutory powers to grant exemptions from provisions of Title IV of the Act extend only to air carriers and not to individuals or persons other than air carriers. Certain interlocking relationships as specified in section 409 occupied by such persons are lawful only if approved by the Board upon due show-

ing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby. The Board has determined in this regard that since it is granting exemption to certain Irregular Air Carriers from the requirements of section 409 with respect to certain relationships, a due showing within the meaning of the statute to justify approval of an interlocking relationship, upon application filed by an officer or director of an Irregular Air Carrier, would be made by a showing that such carrier itself had been granted an exemption from the necessity of obtaining approval. To require each such officer or director to file such an application and make such a showing, however, would appear to impose a useless administrative burden upon the Board and would not be conducive to the proper dispatch of business and to the ends of justice. The Board has determined, therefore, that such showing by all such officers and directors individually shall be presumed to have been made, and upon the basis thereof has granted blanket approval of such interlocking relationships in Section 292.1 below.

8. In view of the foregoing considerations, the present enforcement of the provisions of Title IV, except to the extent required in Section 292.1 below, would be an undue burden on Irregular Air Carriers by reason of the limited extent of, and the unusual circumstances affecting the operations of such carriers, and would not be in the public interest.

On the basis of the foregoing findings and pursuant to the Civil Aeronautics Act of 1938, as amended, particularly sections 205 (a) and 416 (b) thereof, and for the purpose of providing for the economic regulation of services conducted on an irregular basis by non-certificated air carriers, the Civil Aeronautics Board hereby amends Section 292.1 of the Economic Regulations in its entirety to read as follows effective June 10, 1947:



No. 11,865

IN THE
United States Court of Appeals
For the Ninth Circuit

TRANS-PACIFIC AIRLINES, LTD.
(a corporation),

Appellant,

vs.

HAWAIIAN AIRLINES, LIMITED
(a corporation),

Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF FOR HAWAIIAN AIRLINES, LIMITED, APPELLEE.

J. GARNER ANTHONY,

WILLIAM F. QUINN,

312 Castle & Cooke Building, Honolulu 1, Hawaii,

Counsel for Appellee.

ROBERTSON, CASTLE & ANTHONY,

312 Castle & Cooke Building, Honolulu 1, Hawaii,

Of Counsel.

Subject Index

	Page
Opinions Below	1
Jurisdiction	1
Statutory Provisions	2
Statement of the Case.....	2
Question Presented	4
Summary of Argument	5
Argument	6
I. Section 292.1 of the Economic Regulations exempts from certain provisions of the Act only the irregular operations of "irregular air carriers" as therein de- fined	6
II. The District Court was competent to pass on the issue presented; it is not within the primary jurisdiction of the Board	15
A. A court is competent to construe the regulations of an administrative board.....	15
B. The issues involved here were properly decided by the District Court without reference to the Board	19
Appendix.	

Table of Authorities Cited

Cases	Pages
Adler v. Chicago & Southern Air Lines, 41 F. Supp. 366 (1941)	19
Alaska Air Transport Inc., and Marine Airways, d.b.a. Alaska Coastal Airlines v. Alaska Airplane Charter Co., 72 F. Supp. 609 (1947)	22
Assigned Car Cases, 274 U.S. 564 (1927)	16
Baltimore & Ohio R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U.S. 481 (1910)	24
Blumenthal v. United States, 88 F.(2d) 522 (CCA 8th, 1937)	22
Bridges v. Nixon, 327 U.S. 135 (1945)	17
Brown Lumber Co. v. Louisville and Nashville R.R., 299 U.S. 393 (1937)	18, 26
Columbia Broadcasting System v. United States, 316 U.S. 407 (1942)	16
Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922)	20, 25, 26
Illinois Central R. Co. v. Mulberry Hill Coal Co., 238 U.S. 275 (1915)	25
Investigation of Non-Scheduled Air Services, Docket No. 1501, 6 CAB 1049 (1946)	14, 16
Kraus & Bros. v. United States, 327 U.S. 614 (1946)	16
Matter of the Non-Certificated Operations of Trans-Caribbean Air Cargo Lines, Inc., Docket No. 2593	23
Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U.S. 304 (1913)	24
Page Airways, Inc., Investigation, 6 CAB 1061 (1946)	13, 23
Penna. R.R. v. Puritan Coal Co., 237 U.S. 121 (1915)	25
Robinson v. B. & O. R.R., 222 U.S. 506 (1912)	19
Schwartzman v. United Air Lines Transp. Corp., 6 FRD 517 (1947)	19
Standard Air Lines, Inc., Exemption Request; Docket No. 3430, et al., 2 CCH Av.L.R. par. 21,125; 17 L.W. 2173	13
Stimson Lumber Co. v. Kuykendall, 275 U.S. 207 (1927) ...	22

	Pages
Texas & Pacific Railway v. Abilene Cotton Oil Co., 204 U.S. 426 (1907)	19, 27
Texas & Pacific Ry. Co. v. American Tie and Lumber Co., 234 U.S. 138 (1914)	27
Texas & Pacific Railway v. Gulf, C. & S. F. Ry., 270 U.S. 266 (1926)	22
Trans-Marine Airlines, Inc., Investigation, 6 CAB 1071 (1946)	23
United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932)	19

Miscellaneous

Dickinson, Administrative Justice and the Supremacy of Law in the United States (1927) 55	20
Landis, The Administrative Process (1938) 152	21

Statutes and Regulations

Administrative Procedure Act, Sec. 2(c); 5 U.S.C. Supp. 1001(c)	15
Civil Aeronautics Act of 1938, as amended, 49 U.S.C. Sec. 401 et seq., 52 Stat. 973 et seq.	2
Section 1; 49 U.S.C. Sec. 401	6
Section 401(a); 49 U.S.C. Sec. 481(a)	2, 4, 5, 6, 11, 22, 24
Section 416(a); 49 U.S.C. Sec. 496(a)	7
Section 416(b); 49 U.S.C. Sec. 496(b)	8, 10
Section 1007(a); 49 U.S.C. Sec. 647(a)	1, 4, 7, 28
Economic Regulations of Civil Aeronautics Board, Section 292.1; 12 Fed. Reg. 3076	4, 5, 7, 8, 10, 11, 12, 13, 21, 22, 23, 24, 27
Hawaiian Organic Act, Act of April 30, 1900, c. 339 as Amended; 48 U.S.C. Secs. 642, 642a	2
Judicial Code, Section 128; 28 U.S.C. Secs. 1291, 1293, 1294	2
Reorganization Plan, No. IV, 5 Fed. Reg. 2421	2

No. 11,865

IN THE
United States Court of Appeals
For the Ninth Circuit

TRANS-PACIFIC AIRLINES, LTD.

(a corporation),

vs.

Appellant,

HAWAIIAN AIRLINES, LIMITED

(a corporation),

Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF FOR HAWAIIAN AIRLINES, LIMITED, APPELLEE.

OPINIONS BELOW.

The Findings of Fact and Conclusions of Law (R. 13-15) of the District Court are not reported; the opinion of the District Court on the temporary injunction is reported at 73 F. Supp. 68.

JURISDICTION.

The jurisdiction of the United States District Court for the Territory of Hawaii was founded (R. 15) upon Section 1007(a) of the Civil Aeronautics Act of 1938,

as amended, 52 Stat. 1027(a), 49 U.S.C. 647(a) and upon Section 86 of the Hawaiian Organic Act, Act of April 30, 1900, c. 339 as amended; 48 U.S.C. Sections 642, 642a.

The jurisdiction of this Court rests upon Section 128 of the Judicial Code, amended, 28 U.S.C. Sections 1291, 1293 and 1294. The decree of the District Court enjoining appellant's illegal operations was entered on November 10, 1947 (R. 15). Notice of appeal was filed November 20, 1947 (R. 23).

STATUTORY PROVISIONS.

The relevant portions of the Civil Aeronautics Act of 1938 as amended,¹ and of the Economic Regulations of the Civil Aeronautics Board are set forth in the Appendix.

STATEMENT OF THE CASE.

Hawaiian Airlines, Limited, appellee, brought action in the District Court against appellant to enjoin it from operating as a scheduled air carrier engaged in air transportation in violation of Section 401(a) of the Civil Aeronautics Act of 1938 as amended.² (R. 3). At the conclusion of the trial on the merits the Dis-

¹52 Stat. 973; 49 U.S.C. 401, herein called the "Act". By Reorganization Plan No. IV, 5 Fed. Reg. 2421 the "Civil Aeronautics Authority" became the "Civil Aeronautics Board" herein referred to as the "Board".

²49 U.S.C. Sec. 481(a).

trict Court found that Hawaiian Airlines, Limited, was the holder of a certificate of public convenience and necessity issued by the Board authorizing it to engage in air transportation within the Territory of Hawaii (R. 13); that appellant, Trans-Pacific Airlines, Ltd. (Trans-Pacific), was an air carrier within the meaning of the Act, engaged in air transportation within the Territory of Hawaii and had conducted a regular scheduled daily service as a common carrier between points within the territory from January 1, 1947 to September 11, 1947 without having a certificate of public convenience and necessity from the Board (R. 13); that Trans-Pacific held a Letter of Registration issued to it by the Board, but did not operate within the allowable limits of Section 292.1 of the Economic Regulations (R. 13).

The District Court concluded that Hawaiian Airlines, Limited, was damaged by Trans-Pacific; that Trans-Pacific did not operate within the allowable limits of Economic Regulations 292.1 and that it did not operate under any exemption pursuant to Section 416 of the Act or any rule, regulation or order of the Board. Accordingly the District Court held that Trans-Pacific during the period January 1, 1947, to September 11, 1947, was in continuous and repeated violation of Section 401(a) of the Act to the damage of Hawaiian Airlines, Limited, and that since the court had jurisdiction to enjoin violations of Section 401(a) of the Act, it could and did order the entry of a decree permanently enjoining the unlawful operations of appellant (R. 14).

Pursuant to the Findings of Fact and Conclusions of Law, a final decree was entered on November 10, 1947 (R. 15), and a permanent injunction pursuant to the decree issued (R. 19). The court retained jurisdiction to modify the decree in the event the Board should modify or rescind its regulations.

The facts of appellant's daily scheduled air transportation without a certificate of public convenience and necessity is not challenged here. The sole issue raised on this appeal is the jurisdiction of the District Court to entertain the proceeding.

QUESTION PRESENTED.

This appeal presents a single question:

Did the District Court have jurisdiction to restrain appellant's violations of Section 401(a) of the Act pursuant to the authority conferred on it by Section 1007(a)?

For purposes of clarity it will be treated in two parts:

(a) Did appellant's Letter of Registration issued pursuant to Economic Regulations 292.1 exempt it from the provisions of Section 401(a) of the Act even though appellant was not an irregular air carrier as defined in the regulation?

(b) Was the District Court competent to determine whether appellant's operations were "irregular" within the meaning of Economic Regulations 292.1 of the Civil Aeronautics Board?

SUMMARY OF ARGUMENT.

The District Court had express statutory jurisdiction to enjoin appellant's illegal scheduled operations by virtue of Section 1007(a) of the Act. Appellant was not exempt from the provisions of Section 401(a) of the Act prohibiting air carriers from engaging in air transportation without holding a certificate of convenience and necessity.

Section 292.1 of the Economic Regulations of the Civil Aeronautics Board (by virtue of which appellant claims an exemption) exempts only Irregular Air Carriers from certain provisions of Title IV of the Act, including Section 401(a). The mere fact that appellant registered with the Civil Aeronautics Board pursuant to the terms of this regulation, and received a Letter of Registration, does not in and of itself exempt appellant from the provisions of Section 401(a). Appellant must bring itself within the exempted class of carriers before it can claim exemption.

The District Court was competent to construe Section 292.1 of the Economic Regulations to determine whether appellant was in fact an irregular air carrier. This issue did not present a question requiring the court to defer to the jurisdiction of the Civil Aeronautics Board. Having determined that appellant was not an irregular air carrier, the District Court properly exercised its jurisdiction under Section 1007(a) of the Act to enjoin its operations as an air carrier engaged in air transportation without holding a certificate of convenience and necessity.

ARGUMENT.

I.

SECTION 292.1 OF THE ECONOMIC REGULATIONS EXEMPTS
FROM CERTAIN PROVISIONS OF THE ACT ONLY THE IR-
REGULAR OPERATIONS OF "IRREGULAR AIR CARRIERS"
AS THEREIN DEFINED.

Section 401(a) of the Act³ provides in part that:

No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Pertinent terms are defined in Section 1,⁴ as follows:

(2) 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation;

(10) 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft;

(21) 'Interstate air transportation' * * * means the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, * * *

(a) * * * places, in the same * * * Territory * * *.

Trans-Pacific was an air carrier engaged in air transportation without holding a certificate of convenience and necessity. In the absence of further

³49 U.S.C. Sec. 481(a).

⁴49 U.S.C. Sec. 401.

facts, then, the operations of Trans-Pacific as a common carrier by air would be unlawful under Section 401(a) and could be enjoined at the suit of any party in interest under the express grant of jurisdiction contained in the Act.⁵ That section provides that——

Judicial Enforcement

Jurisdiction of Court

(a) If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder * * * the Board, its duly authorized agent, or *in the case of a violation of section 401(a) of this Act, any party in interest*, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, * * *; and *such court shall have jurisdiction to enforce obedience thereto by a writ of injunction* * * *. (Emphasis supplied.)

Trans-Pacific relies on Section 292.1 of the Economic Regulations⁶ to relieve it from conducting its daily scheduled service without having a certificate authorizing such air transportation as is required by Section 401 of the Act. This regulation was promulgated under the authority of Section 416(a) and (b) of the Act which empowers the Board to——

* * * establish such just and reasonable classifications or groups of air carriers * * * as the nature of the services * * * shall require * * *;⁷

⁵49 U.S.C. Sec. 647(a).

⁶12 Fed. Reg. 3076, May 10, 1947.

⁷49 U.S.C. Sec. 496(a).

and to——

* * * exempt from the requirements of this title or any provision thereof, * * * any air carrier or class of air carriers * * *.⁸

Section 292.1(b) of the regulation establishes a classification of non-certificated carriers designated as “irregular air carriers”. An irregular air carrier is defined as an air carrier (1) which does not hold a certificate of convenience and necessity (2) which engages in interstate or overseas air transportation, and (3)——

* * * which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an irregular air carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points.
* * *

Section 292.1(c) of the regulation provides:

Exemptions—(1) General. Except as otherwise provided in this section, irregular air carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as

⁸49 U.S.C. Sec. 496(b)(1).

amended, other than the following: (Exceptions not here pertinent.)

In this regulation, the Board by administrative action, after hearing⁹ established a classification of air carriers and exempted that class from the requirement of obtaining a certificate of public convenience and necessity. As a condition precedent to enjoyment of the exemption, irregular air carriers had to apply for and receive a Letter of Registration issued by the Board.¹⁰ The prescribed form of application contains no information concerning the extent of the operations of the applicant, upon which a determination can be made as to the regularity or irregularity thereof.¹¹ The Board conducts no hearing before issuing such letters. The letter itself is not an order of the Board adjudicating its holder an irregular air carrier. By its terms it carefully states:

This is not a certificate of public convenience and necessity and is merely evidence of registration (R. 80).

The applying carrier determines for itself whether or not it falls within the exempted class. The non-scheduled exemption order was adopted in 1938. It was not until after the *Investigation of Non-Scheduled Air Services* in 1946,¹² that the registration provision was put into effect. Its purpose was to facili-

⁹Investigation of Non Scheduled Air Services, Docket No. 1501, 6 CAB 1049 (1946).

¹⁰Sec. 292.1(d) (1) and (2), 12 Fed. Reg. 3078.

¹¹Ibid.

¹²6 CAB 1049.

tate the gathering of data to “provide a firmer foundation for permanent regulation”.¹³

Trans-Pacific is in error in asserting that because it has registered under Regulation 292.1, it is for all purposes exempt from the effect of Section 401(a) of the Act, requiring air carriers engaged in air transportation to obtain a certificate of convenience and necessity. To be sure, certain air carriers are exempt, but in order to enjoy the exemption they must bring themselves within the class of irregular air carriers to which the regulation is directed. If they fail to do so (as appellant failed in this case) they are without the scope of the exempting regulation and must hold a certificate or a special exemption if they would continue to operate. Lacking such authority, an air carrier will be operating in violation of Section 401(a) of the Act and may be enjoined in the District Court pursuant to the express command of Section 1007(a) of the Act. Upon the facts found by the District Court, Trans-Pacific did not bring itself within any exemption.

If, as Trans-Pacific seems to argue (Brief, p. 29), the Letter of Registration issued in this case be considered an order specifically exempting Trans-Pacific from the requirement of obtaining a certificate of convenience and necessity, the Board's action would be beyond the bounds of its statutory power and illegal. As previously stated, Section 416(b)(1) empowers the Board to exempt from certain sections of the Act “any air carrier or class of air carriers” but only—

¹³Id. p. 1056.

if it finds that the enforcement * * * would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

Assuming that the establishment of a class of irregular air carriers as defined in the regulation is reasonable and that the prerequisite findings were made before exemption of that class, the Board has made no finding that Trans-Pacific is an irregular air carrier, and that the enforcement of the Act would be unduly burdensome to it and not in the public interest. Therefore, if the court should hold that the mere issuance of a Letter of Registration is tantamount to specific exemption it must disregard the express limitations on the exempting power in Section 416. Further, such Board action would be contrary to the Congressional mandate in Section 401(a) requiring certification of all common carriers by air.

Trans-Pacific points to certain other provisions in Section 292.1 of the regulation as indicating that the Letter of Registration exempts them entirely from Section 401(a) of the Act. Section 292.1(d)(2) provides for expiration of the Letter of Registration after a finding by the Board that enforcement of Section 401 would be in the public interest and "would no longer be an undue burden on such Irregular Air Carrier or Class of Irregular Air Carriers."

This argument is circular. Our concern is whether Trans-Pacific was an irregular air carrier. The above

section authorizes the Board to rescind the exemption of irregular air carriers but does not lend credence to the assertion that all who hold such letters are *ipso facto* exempt as falling within that class.

Similarly, Section 292.1(d)(4) allows suspension and Section 292.1(d)(5) authorizes revocation of Letters of Registration. But these sections obviously are designed to grant the Board authority to suspend or revoke the exemption of an irregular air carrier if that carrier has violated the Act or regulations or if the Board finds it necessary in the public interest. A Letter of Registration is a condition precedent to an air carrier operating as an irregular air carrier, so that revocation or suspension of it will prevent operation. But an air carrier cannot conduct regularly scheduled operations without a certificate of convenience and necessity merely because it has registered as an irregular air carrier.

The Civil Aeronautics Board acting on its own initiative investigated two purportedly nonscheduled airlines, and finding that they were in fact operating a regular service, held (1) that their operations were not nonscheduled within the meaning of Section 292.1 of the Board's Economic Regulations, and that therefore (2) they had failed to comply with Section 401(a) of the Act by engaging in air transportation without having in force a certificate issued by the Board. As the Board said in *Page Airways*:

The final question for determination here is whether the pattern of service that characterized respondent's operations was such as to constitute

it a scheduled air carrier not within the explicit exemption provided for in the above regulation.¹⁴

It seems clear that a carrier, to take advantage of the exemption must prove that it falls within the exempt class. Mere registration under the Regulation (based on the carrier's individual judgment as to whether it is exempt) will not in and of itself confer the exemption.

In a case decided by the Board on October 13, 1948,¹⁵ the entire effect of Regulation 292.1 was reviewed. Certain air carriers holding Letters of Registration sought an additional exemption under Section 416(b) of the Act to permit scheduled operations. Their plan was to operate a low cost coach service which, they alleged, would develop new classes of traffic and would not compete with certificated airlines. In denying the exemption, the Board first looked to Section 416 of the Act and found that it had no statutory authority to grant exemption of the type sought.

There is nothing in the provisions of Section 416 which empowers the Board to authorize the establishment of air transportation service without meeting the requirements of Section 401 of the Act, unless there is a direct showing that enforcement of the provisions of that section would be an undue burden on the air carrier and is not in the public interest * * *. There is nothing in

¹⁴Page Airways, Inc., Investigation, 6 CAB 1061, 1067 (1946); Trans-Marine Airlines, Inc., Investigation, 6 CAB 1071 (1946).

¹⁵Standard Air Lines, Inc.—Exemption Request: Docket No. 3430 et al., 2 CCH Av. L. R. par. 21,125; 17 L.W. 2173.

the Act or its legislative history to justify the Board in by-passing or ignoring the certification provisions of Section 401 of the Act by authorizing extensive new operations which * * * are neither unusual as to circumstances nor limited in extent.

The Board reiterated the standards of irregular service which it had promulgated in the *Investigation of Non-Scheduled Air Services*,¹⁶ and went on to say that:

Any operations which are being conducted by these carriers beyond those authorized by the Letters of Registration, issued under Section 292.1 of the Economic Regulations, are being conducted at their own risk of violating the Act and the Board's regulations. * * * Clearly * * * the Board did not intend to authorize anything more than irregular and infrequent service.

Here is a categorical denial by the Board that Letters of Registration exempted the holders thereof from the provisions of Section 401. Not only does the Board lack power to effect such an exemption without appropriate findings in the case of each applying carrier, but also the Letter of Registration did not purport to do more than exempt the air carrier who received it insofar as his operations were irregular.

¹⁶⁶ CAB 1049 (1946).

II.

THE DISTRICT COURT WAS COMPETENT TO PASS ON THE ISSUE PRESENTED; IT IS NOT WITHIN THE PRIMARY JURISDICTION OF THE BOARD.

A. A court is competent to construe the regulations of an administrative board.

We are not here concerned with the question whether the construction of the regulation in this instance is the type of question the Board should decide, but rather whether the nature of an administrative regulation requires a court to refrain from construing it.¹⁷ For purposes of this discussion, we use “regulation” to mean——

an agency statement of general * * * applicability and future effect designed to implement, interpret, or prescribe law or policy * * *¹⁸

Section 292.1 of the Economic Regulations, being generally applicable to all irregular air carriers and governing their future action, falls within this definition. In dealing with the question of the power of a court to construe an administrative regulation, it is fitting to deal also with Trans-Pacific’s suggestion that the Board could apply its regulation differently to Trans-Pacific than it has in the past to other carriers

¹⁷In its Brief, p. 34, Trans-Pacific appears to take the position that construction of an administrative regulation is a function solely of the promulgating board.

¹⁸See Administrative Procedure Act, sec. 2(c), 5 U.S.C. Supp. 1001(c) ; for our purposes “rule” means a statement of particular as distinct from general applicability.

claiming exemption.¹⁹ This is true because the leading cases where courts have construed administrative regulations have been cases where the court has held that regulations are adopted in the exercise of a delegated legislative power, and therefore, like statutes must be applied equally in all instances. This is a sound protection against discrimination within the administrative process. If an agency can exercise the delegated power to make general regulations governing future conduct with only a legislative hearing wherein all persons affected need not be heard, due process and protection of individuals affected require that the published regulation be construed the same for all, despite privilege or hardship in special cases.²⁰

A case bearing on the problem is *Columbia Broadcasting System v. United States*.²¹ There the Federal Communications Commission by regulation which it termed an "announcement of policy" ruled that it would refuse licenses to radio stations which entered into certain defined types of contract with any broadcasting network. In dealing with the Government's assertion that this regulation was not an "order"

¹⁹Appellant's brief, pp. 35, 41. In this connection it is interesting to note that in *Investigation of Non-Scheduled Air Services*, 6 CAB 1049, the Board refers to the page (6 CAB 1061) and *Trans-Marine* (6 CAB 1071) cases as "a guide to other operators in ascertaining for themselves whether they are covered by the exemption order or should discontinue the services until an appropriate certificate of public convenience and necessity is obtained."

²⁰*Assigned Car Cases*, 274 U.S. 564 (1927).

²¹316 U.S. 407 (1942); see also *Kraus & Bros. v. U. S.*, 327 U.S. 614 (1946).

under the Urgent Deficiencies Act, Mr. Chief Justice Stone said:

Unlike an administrative order or a court of judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceedings, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms are addressed.²²

Holding that the regulation was an “order” within the meaning of the Urgent Deficiencies Act, the court proceeded to rule against the Government’s assertion that its regulation was an “announcement of policy” which should be treated like a press release, saying——

When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command * * * they must be taken by those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the commission and all others whose rights may be affected by the commission’s execution of them.²³

Similarly the Supreme Court has overturned an administrative decision where the administrator failed to follow his own Rules of Practice in a particular hearing, even though the administrator had acted properly according to his own interpretation of the rules.²⁴

²²Id. 316 U.S. at 418.

²³Id. p. 422.

²⁴*Bridges v. Nixon*, 326 U.S. 135 (1945).

And the court has upheld the contention of a railroad that the ICC misconstrued its own regulation in allowing a reparations award.²⁵

These are a few of the many cases demonstrating that no peculiar sanctity inheres in administrative regulations which renders them free from judicial construction. They are promulgated in the exercise of a delegated legislative power to govern the future actions of persons affected. They have the force of law, but the public must know what is expected of it. This knowledge can only come from a determination of the meaning and intendment of the words of the regulation as published. Should a dispute arise over the proper construction, the arbiter of their meaning is the court, unless a rule of judicial self-restraint such as the doctrine of primary jurisdiction or exhaustion of remedy, leads the court to decline to accept jurisdiction. And the promulgating body is bound by its own regulation as reasonably interpreted unless and until it shall have amended the regulation by proper administrative action.

In the instant case, the mere fact that the District Court was called upon to construe Regulation 292.1 did not require him to eschew his statutory jurisdiction over the action. Nor should he have been dissuaded from deciding the case by Trans-Pacific's assertions that the Board might construe the regulation differently with respect to its operations, for, as we have seen, the Board is bound by the reasonable

²⁵*Brown Lumber Co. v. Louisville and Nashville R.R.*, 299 U.S. 393 (1937).

meaning of the regulation for all purposes and in all cases.

B. The issues involved here were properly decided by the District Court without reference to the Board.

In its brief, Trans-Pacific has set forth at length the origin and development of the doctrine of primary jurisdiction. The doctrine was developed principally in the field of determination of reasonableness of rates charged by common carriers, and requires a court to withhold action until the appropriate administrative body has decided what rate is reasonable. The fundamental purpose is to preserve uniformity of regulation pursuant to the Congressional purpose in establishing the regulatory bodies.²⁶ The doctrine has since been extended to cases relating to discriminatory practices of regulated industries,²⁷ in cases where (1) the governing statute gives the regulatory body jurisdiction,²⁸ and (2) the nature of the question presented requires consideration of complex facts relating to the regulated industry, requiring determination by the expert administrative board primarily concerned therewith. Thus it is that Justice Brandeis defines

²⁶*Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); this case is generally regarded as the landmark in the field.

²⁷*United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932); *Robinson v. B. & O. R.R.*, 222 U.S. 506 (1912).

²⁸Compare *Adler v. Chicago & Southern Air Lines*, 41 F. Supp. 366 (1941) with *Schwartzman v. United Air Lines Transp. Corp.*, 6 FRD 517 (1947) as to when action of a regulated company is a "practice" over which the administrative board would have jurisdiction. The *Schwartzman* case contains an excellent review of the development of the doctrine of primary jurisdiction.

the bounds of administrative and judicial activity in the following oft-quoted phrases:

Wherever a rate, rule or practice is attacked as unreasonable or unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative, in contradistinction to judicial. But, ordinarily, the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission.²⁹

In the foregoing case, Mr. Justice Brandeis apparently makes the application of the doctrine depend upon whether the "controverted question" is one of "fact" or "law". There is no fixed distinction between these types of questions.

Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law.³⁰

²⁹*Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922).

³⁰Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (1927) p. 55.

A learned authority on the development of administrative law has indicated that the line should be drawn between those issues requiring expert analysis by persons experienced in the industry concerned, and those issues wherein the courts have traditionally been expert.³¹

Did the court below decide an issue of fact or an issue of law? Was there any aspect of the problem whether Trans-Pacific fell within the class of carriers exempted by Regulation 292.1 which required administrative discretion or expertise? We have already shown that the Board could not in its discretion reinterpret the regulation to exempt Trans-Pacific if the regulation did not in its plain language effect that exemption.³²

The District Court was called upon to determine whether Trans-Pacific was an air carrier operating without a certificate. The court had express statutory jurisdiction over this matter. But Trans-Pacific asserted an exemption under the Board regulation, claiming it was an "irregular air carrier". Was the jurisdiction of the court ousted by this assertion, or could the court decide the question whether Trans-

³¹Landis, *The Administrative Process* (1938) p. 152. "Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions. It is from that very desire that the nature of questions of law emerges. For, in the last analysis, they seem to me to be those questions that lawyers are equipped to decide."

³²Trans-Pacific could have and did apply for an individual exemption order which the Board had power to grant under Section 416(b)(1) of the Act. That petition is of record in Docket No. 2390 before the Civil Aeronautics Board.

Pacific was exempt from the mandatory provisions of Section 401(a)? We submit that the court manifestly had and properly retained jurisdiction to decide this matter.

The issue presented involves no question of reasonableness or discrimination in rates or practices of the carrier. Such issues comprise the bulk of matters with which the Board as the regulatory body is better equipped to deal. The question is one of application of the Board's regulation. The validity of the regulation is not called into question. The court had to determine whether Trans-Pacific had "held itself out to the public", as operating "with a reasonable degree of regularity" between designated points. Irregularity of service exists where "services offered and performed * * * are of such infrequency as to preclude an implication of a uniform pattern."³³

The question of whether Trans-Pacific held out or represented to the public that it carried on a particular type of service is the same question with which courts traditionally treat when they decide whether a carrier is or is not a common carrier.³⁴

The Board has recognized that the "holding out" within the meaning of their regulation is the same as

³³Section 292.1(b), Economic Regulations, 12 Fed. Reg. 3077.

³⁴Common carrier is defined as one who holds himself out to the public as ready and willing to undertake for hire the transportation of passengers or property from place to place. *Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211 (1927); *Texas & Pac. Ry. v. Gulf, C.&S.F. Ry.*, 270 U.S. 266 (1926); *Blumenthal v. United States*, 88 F. (2d) 522, 528 (CCA 8th 1937); *Alaska Air Transport Inc., and Marine Airways d/b/a Alaska Coastal Airlines v. Alaska Airplane Charter Co.*, 72 F. Supp. 609 (1947).

the traditional common carrier test.³⁵ The District Court was clearly competent to decide this part of the question. What of the issue of irregularity? The regulation itself in unambiguous language indicates that frequency and pattern of operation excludes a carrier from the exemption. Can the court determine when such frequency and pattern exists? We submit it can. No expert knowledge is required to determine that an airline has been operating a “daily scheduled regular service” (R. 14). The complexities of national air transportation are not involved in making this determination. Expert consideration by the Board is not required. In addition to the explicit definition contained in the regulation, the Board has declared certain standards of interpretation of its regulation. In the *Investigation of Non-Scheduled Air Carriers*,³⁶ the Board refers to the *Page*,³⁷ and *Trans-Marine*,³⁸ cases as guides—

to determine if the services conducted by the carriers involved were within the terms of the exemption order.

And the Board set forth in the Explanatory Statement on Revision of Section 292.1 of the Economic Regulations an order entered by the Board in the *Matter of the Non-Certificated Operations of Trans-Caribbean Air Cargo Lines, Inc.*³⁹

from which further guidance as to the extent of permissible operations may be obtained.

³⁵*Page Airways, Inc., Investigation*, 6 CAB 1061, 1067 (1946).

³⁶6 CAB 1049, 1054 (1946).

³⁷6 CAB 1061 (1946).

³⁸6 CAB 1071 (1946).

³⁹Docket No. 2593.

This order formed the basis for the injunction issued by the District Court in the instant case (R. 21). Similar orders were issued in *Willis Air Service, Inc.*⁴⁰ and *Trans-Luxury Airlines, Inc.*⁴¹

In the foregoing cases, the Board has carefully and consistently interpreted its own regulation. We have no quarrel with its interpretation. We insist that the District Court has the right to make the same interpretation, particularly in the light of the express mandate of judicial enforcement when Section 401(a) of the Act is violated.

The significance of the fact that in this case, appellee asserts the validity of the published regulation of the Board rather than challenges its reasonableness and merely asks that the court apply the regulation in exercising its statutory jurisdiction under Section 1007 is illustrated by the cases concerned with coal car allocations by railroads. Where a coal operator alleged that the carrier had, by adopting an allocation rule, discriminated against him, the Supreme Court held that the operator must seek his remedy before the ICC.⁴² The issue of propriety of the rule was primarily administrative.

But where the coal operator alleged that the railroad had failed to comply with the rule, the court held that it had jurisdiction to force the carrier to abide

⁴⁰Docket No. 2639.

⁴¹Docket No. 2589.

⁴²*Baltimore & Ohio R. Co. v. United States ex rel., Pitcairn Coal Co.*, 215 U.S. 481 (1910). Accord: *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U.S. 304 (1913).

by the published rules.⁴³ In construing and enforcing this rule, the court had to determine how the carrier was distributing its cars, what the coal output of the plaintiff was, and that of its competitors, and whether the plaintiff was getting his proper share of cars under the rule. Yet it was held that these questions required no administrative expert to decide them and that uniformity could be maintained by court construction and application.

So, too, in *Great Northern Ry. v. Merchants Elevator Co.*,⁴⁴ wherein Mr. Justice Brandeis wrote his landmark opinion, the court approved judicial determination whether corn held at the destination named in the bill of lading for inspection whereupon disposition orders were given and original bills of lading surrendered in exchange for new billing to the ultimate destination had been, "diverted, reconsigned or reforwarded" within the meaning of Rule 10 of the tariff or whether the situation was within exception (a) as having been held "for inspection and disposition orders incident thereto."

The court said:⁴⁵

Here no fact, evidential or ultimate, is in controversy and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense

⁴³*Penna. R.R. v. Puritan Coal Co.*, 237 U.S. 121 (1915). Accord: *Illinois Central R. Co. v. Mulberry Hill Coal Co.*, 238 U.S. 275 (1915).

⁴⁴259 U.S. 285 (1922).

⁴⁵*Ibid.* p. 294.

and to apply the meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary.

The court should note that construction of the rule in the *Great Northern* case required the court to deal with terms which, though used in their ordinary sense, were nevertheless technical words in the transportation industry. On the other hand, the District Court in the present case found it necessary to construe the words "regular" "irregular" "infrequency" "pattern" all of which were words of general usage. And by the Board's own interpretations, it is apparent that they were used in their usual and ordinary meaning.

In *Brown Lumber Co. v. Louisville and Nashville R. Co.*,⁴⁶ a shipper brought an action for overcharges before the Interstate Commerce Commission. The Commission construed the railroad's tariff to require the so-called "combination rule" to be applied to determine the rate payable by the shipper, and order reparations. The railroad refused to comply. The shipper brought an action in the District Court. The railroad demurred, and its demurrer was sustained in the lower court and on appeal on the ground that the Interstate Commerce Commission had misconstrued the tariff. A proper construction prevented the application of the "combination rule." Overruling the shipper's contention that preliminary resort to the

⁴⁶299 U.S. 393 (1937).

Commission was necessary and its construction conclusive, because application of the rule involved administrative discretion and determination of reasonableness of the practice,⁴⁷ the court said:

To determine whether the rule was applicable to the several shipments does not call for, or indeed permit, the consideration of any of these matters.⁴⁸

The foregoing cases, and the instant case differ significantly from *Texas and Pacific Ry. Co. v. American Tie and Lumber Co.*⁴⁹ There the question was whether oak railroad cross-ties were included within the terms "lumber, all kinds (except walnut and cherry)" in the published tariff of the carrier, or whether they were, as the carrier alleged, "a separate and distinct and well recognized freight commodity."

This issue was not one of construction, but rather a question whether a usage prevailed in the railroad and lumber businesses, which gave a peculiar meaning to the word "lumber" in the tariff. The court held that the Interstate Commerce Commission must determine that question.

In the present case, the words of Section 292.1 of the Board's Economic Regulations are clear and unambiguous. They are non-technical words. Their meaning is not to be derived from the complexities of the national air transportation system. Their ordinary

⁴⁷Cf. Trans-Pacific's contention, Brief, pp. 34-35.

⁴⁸299 U.S. 393, 398, per Brandeis, J.

⁴⁹234 U.S. 138 (1914).

meaning is to be applied to undisputed facts. The District Court was competent to determine whether Trans-Pacific had brought itself within the class of “irregular air carriers” exempted in the Regulation. Since Trans-Pacific failed to do so, the court was bound to exercise its statutory jurisdiction to enjoin the illegal operations at the suit of a party in interest.

Significantly, the Board in its brief as *amicus curiae* before the District Court did not claim that determination of the question whether Trans-Pacific was an “irregular air carrier” required its expert administrative judgment. On the contrary, the Board merely set forth the words of the regulation, and one of its orders issued pursuant thereto, and stated—

If the defendant is found to have conducted daily air transportation service as alleged, or any otherwise reasonably regular service between the same two or more points, such service would exceed in frequency and regularity those operations permitted under Section 292.1 and accordingly would not be authorized thereby.

The District Court in the present case applied the common words of the Board’s regulation in their ordinary meaning to determine that Trans-Pacific was not within the class exempted thereby, and then exercised its normal equity jurisdiction as expressly authorized and directed to do by Congress in Section 1007 of the Act to enjoin unlawful competition by an uncertificated carrier. The District Court would have erred had it refused to entertain jurisdiction.

We submit that the decree below should be affirmed.

Dated, Honolulu, Hawaii,

November 3, 1948.

Respectfully submitted,

J. GARNER ANTHONY,

WILLIAM F. QUINN,

Counsel for Appellee.

ROBERTSON, CASTLE & ANTHONY,

Of Counsel.

(Appendix Follows.)



Appendix.



Appendix

STATUTORY PROVISIONS.

* * * * *

Definitions

Section 1. As used in this Act, unless the context otherwise requires—

(2) “Air carrier” means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: * * *

(10) “Air transportation” means interstate, overseas or foreign air transportation * * *

* * * * *

(21) “Interstate air transportation” * * * means the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce * * * (a) * * * between places in the same territory * * * of the United States * * * whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(27) “Person” means any individual, firm, co-partnership, corporation, company * * * (52 Stat. 973, 49 U.S.C. 401).

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
Certificate Required

Section 401(a). No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation * * * (52 Stat. 987, 49 U.S.C. 481(a)).

CLASSIFICATION AND EXEMPTION OF CARRIERS

Section 416 * * *

Exemptions

(b)(1) The Board, from time to time and to the extent necessary, may * * * exempt from the requirement of this title (IV) or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier, or class of air carriers, if it finds that the enforcement of this title or such provisions, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest. (52 Stat. 1004, 49 U.S.C. 496(b)).

JUDICIAL ENFORCEMENT.

Section 1007. (a) If any person violates any provision of this Act, * * * the Board, its duly authorized

agent; or, in the case of a violation of section 401(a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act * * *; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees and representatives, from further violation of such provision of this Act * * * and enjoining upon them obedience thereto (52 Stat. 1025, 49 U.S.C. 647 (a)).

SECTION 292.1 OF THE ECONOMIC REGULATIONS (12 Fed. Reg. 3076)

Irregular Air Carriers

(a) *Applicability.* This section shall not apply to any air carrier authorized by a certificate of public convenience and necessity to engage in air transportation, to Alaskan Air Carriers, to operations within Alaska, or to any non-certificated air carrier engaged in air transportation pursuant to special or individual exemption by the Board or pursuant to exemption created by any other section of the Economic Regulations.

(b) *Classification.* There is hereby established a classification of non-certificated air carriers to be designated as "Irregular Air Carriers". An Irregular Air Carrier shall be defined to mean any air carrier

(1) which does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended (2) which directly engages in interstate or overseas air transportation of persons and property or foreign air transportation of property only, and (3) which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points. Within the meaning of this definition a "point" shall mean any airport or place where aircraft may be landed or taken-off, including the area with a 25-mile radius of such airport or place.

(c) *Exemptions.*

(1) *General.* Except as otherwise provided in this section, Irregular Air Carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, other than the following:

* * * * *

(d) *Registration for Exemption.*

(1) *Letter of Registration Required.* From and after 60 days after the effective date of this section no Irregular Air Carrier may engage in any form of air transportation unless there is then outstanding and in effect with respect to such air carrier a Letter of Registration issued by the Board: *Provided*, That if any Irregular Air Carrier, otherwise authorized to engage in air transportation pursuant to this section, shall file with the Board within 60 days after the effective date of this section, an application for a Letter of Registration, such applicant may engage in such air transportation until such Letter has been issued, or such applicant has been notified that it appears to the Board that such applicant is not entitled to the issuance of such Letter.

(2) *Issuance of Letter of Registration.* Upon the filing of proper application therefor, the Board shall issue, to any Irregular Air Carrier, a Letter of Registration which, unless otherwise sooner rendered ineffective, shall expire and be of no further force and effect, upon a finding by the Board that enforcement of the provisions of section 401 (from which exemption is provided in this section) would be in the public interest and would no longer be an undue burden on such Irregular Air Carrier or Class of Irregular Air Carriers. Such application shall be certified to by a responsible official of such carrier as being correct, and shall contain the following information: (i) date; (ii) name of carrier; (iii) mailing address; (iv) location of principal operating base; (v) if a corporation, the place of incorporation, the name and citizen-

ship of officers and directors and a statement that at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions; (vi) if an individual or partnership, the name and citizenship of owners or partners; (vii) the types and numbers of each type of aircraft utilized in air transportation. Such application shall be submitted in duplicate in letter form or on C.A.B. Form No. 2789 which is available on request for the convenience of applicants.

(3) *Non-transferability of Letter of Registration.* A Letter of Registration shall be non-transferable and shall be effective only with respect to the person named therein.

(4) *Suspension of Letter of Registration.* Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest.

(5) *Revocation of Letter of Registration.* Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provision of the Civil Aeronautics Act of 1938, as amended, or of any order, rule or regulation issued under any such provision, or of any term, condition or limitation of any authority issued under said Act or regulations.

No. 11,865

IN THE

United States Court of Appeals
For the Ninth Circuit

TRANS-PACIFIC AIRLINES, LTD.

(a corporation),

Appellant,

vs.

HAWAIIAN AIRLINES, LIMITED

(a corporation),

Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

REPLY BRIEF OF TRANS-PACIFIC AIRLINES,
LIMITED, APPELLANT.

SAI CHOW DOO,

FREDERICK L. HEWITT,

COATES LEAR,

68 Post Street, San Francisco 4, California,

Attorneys for Appellant.

POWELL, LEAR & GAINES,

Washington, D. C.,

FONG, MIHO & CHOY,

Honolulu, T. H.,

Of Counsel.

FILED

DEC 1 1948

Subject Index

	Page
Summary of reply argument	1
Argument	5
I. Appellant was exempt from Section 401 (a) of the Civil Aeronautics Act of 1938 as amended (49 USC 481(a))	5
II. The board had primary jurisdiction to determine the issues of fact presented to the District Court	21
Conclusion	29

Table of Authorities Cited

Cases	Pages
American Air Lines, Inc. v. Standard Air Lines, Inc. (District Court, Southern District New York, decided October 5, 1948, reported in 2 C.C.H. Aviation Law Reporter, 14,757)	7, 28
Columbia Broadcasting System v. United States (1942), 316 U. S. 407	20
Grace & Co. v. Civil Aeronautics Board (C.C.A. 2nd, 1946), 154 Fed. (2d) 271	22
Great Northern R. Co. v. Merchants Elevator Company (1922), 42 S. Ct. 477, 259 U. S. 285, 66 L. Ed. 943	25, 26
Interstate Commerce Commission v. Fordham Bus Corp., 38 Fed. Supp. 739 (S.D. N.Y. 1941)	20
Pacific Northern Air Lines v. Alaska Air Lines (District Court, Alaska, Third Division A4768, decided August 7, 1948)	27, 28

Statutes

Civil Aeronautics Act of 1938, as amended:	
Section 401(a) (49 U.S.C. 481(a))	2, 5, 6, 19, 21, 26
Section 416 (b)(1) (49 U.S.C. 496(b)(1))	2, 5
Section 1007(a) (49 U.S.C. 647(a))	2, 27

Regulations

Economic Regulations of Civil Aeronautics Board:	
Section 292.1 (12 Fed. Reg. 3076)	2, 5, 13

No. 11,865

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TRANS-PACIFIC AIRLINES, LTD.

(a corporation),

vs.

HAWAIIAN AIRLINES, LIMITED

(a corporation),

Appellant,

Appellee.

**On Appeal from the District Court of the United States
for the Territory of Hawaii.**

**REPLY BRIEF OF TRANS-PACIFIC AIRLINES,
LIMITED, APPELLANT.**

SUMMARY OF REPLY ARGUMENT.

Appellant's opening brief and the briefs of appellee and of the Civil Aeronautics Board as amicus curiae reveal that there are two questions to be considered in the matter of this appeal.

First, there is appellant's contention that, having been issued a Letter of Registration, appellant became exempt by the very terms of the Civil Aeronautics Act of 1938, as amended, from the provisions of Section

401(a) of the Act (49 U.S.C. 481(a)). Such exemption is provided by the express terms of Section 416(b) (1) of the Act (49 U.S.C. 496(b)(1) and Section 292.1 of the Economic Regulations (12 Fed. Reg. 3076) (reprinted in the briefs) promulgated by the Board thereunder. Violation of Section 401(a) (49 U.S.C. 481(a)) is the only basis upon which appellee may bring a *court action*, as is provided in Section 1007(a) of the Act. (49 U.S.C. 647(a).) *Since appellee is limited to violation of Section 401(a) as the basis of court action, and appellant is exempt therefrom, the lower court had no jurisdiction to entertain appellee's action.* Appellee endeavors to controvert this contention upon the basis that, insofar as appellant was operating beyond what appellee alleges to be the tolerable limits of Section 292.1 of the Economic Regulations, and Section 416 of the Act which is the statutory authority therefor, then appellant is in violation of Section 401(a) to that extent. But a reading of the other provisions of the Civil Aeronautics Act of 1938, as amended, demonstrates that there is no such intent in the Act. The argument of appellee really proves too much. On principle, if such an argument is favorably viewed, the same argument would permit *de novo* court action of almost any controversy involving alleged excess operations under the Act. By this reasoning, if the holder of a certificate of convenience and necessity allegedly operates beyond his allowed permits, or contrary to prescribed regulations, he is *pro tanto* in excess of his authorization, and thus *pro tanto* without a certificate to that extent.

Any such reasoning applied in all instances does violence to the salutary principles of the well accepted rule of primary jurisdiction, which is appellant's second and more comprehensive point, and injects the courts in each case into a *de novo* jurisdiction, involving complicated administrative discretion. Such cannot be assumed to have been the congressional intent.

In considering both the above question and appellant's second contention based on the principle of primary jurisdiction, the Court is most respectfully urged that no consideration whatsoever should be given to the lower Court's decision on the merits of the case, and the record with regard thereto. Appellant is maintaining that the lower Court should not have proceeded at all, nor rendered any decision. Appellant's point is as pertinent whether the lower Court had found a violation, or had not. Appellee's argument, and particularly that of the Board, assumes that it is properly before the reviewing Court that appellant is *in fact* in violation, and, in fact, therefore, by their reasoning, *pro tanto* in violation. It is submitted that no such assumption can properly be made. *It is a part of appellant's case here that the Board had primary jurisdiction to determine that very point and should have done so.* Thus, any discussion of the merits of the case as found in the amicus curiae brief of the Board, particularly pages 7 to 12, inclusive, is inappropriate and beside the point, in that this discussion goes to the question of whether appellant was, or was not, in actual violation.

Appellant's second and more comprehensive contention is that the Civil Aeronautics Board had primary jurisdiction to determine whether or not appellant had, in fact, violated Economic Regulations 292.1, and whether or not appellant was operating within and under the conditions under which the Letter of Registration and exemption had been issued by the Civil Aeronautics Board to appellant.

The lower Court should have construed the Civil Aeronautics Act not only as a matter of statutory construction requiring exemption, but also by force of the basic principle of the primary jurisdiction of the Board as a matter of good administrative principle and practice to require that the Civil Aeronautics Board, and not the District Court, should determine the merits of the alleged violations by appellant. The basic reasons for the development and existence of the rule of primary jurisdiction are particularly applicable in this case, as such determination not only required the consideration of an extensive body of complex facts pertaining to operations of a specialized and peculiar nature, which are particularly within the expert knowledge of the Civil Aeronautics Board, but also required uniformity of decision and exercise of administrative discretion as to the future operations of appellant. These are among the most cogent reasons for the existence of the rule. Such a determination by the Civil Aeronautics Board was necessary and required under the Civil Aeronautics Act of 1938, as amended, prior to any jurisdiction by any District Court.

ARGUMENT.**I. APPELLANT WAS EXEMPT FROM SECTION 401 (a) OF THE CIVIL AERONAUTICS ACT OF 1938 AS AMENDED (49 USC 481(a)).**

The pertinent sections of the Act have been quoted in all briefs and are now repeated only for clarity. Section 416(b)(1) of the Act (49 U.S.C. 496(b)(1) provides:

“(b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.”

The title referred therein is Title IV of the Act and includes Section 401(a). Pursuant to Section 416(b)(1) the Board promulgated Section 292.1 of the Economic Regulations, reprinted in appellant's brief. Appellant was issued a Letter of Registration under the terms of the regulations. Thus, by the clear terms of the Act and the Economic Regulations, appellant became exempt from Title IV and Section 401(a). The exempting provisions of the Economic Regulations 292.1(c)(1) provides:

“(1) General.—Except as otherwise provided in this section, Irregular Air Carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, other than the following:”

The exceptions are not pertinent to this appeal. Appellee contends that this exemption is only partial, that is, only so far as appellant operates within the limits of the Economic Regulations. (Appellee’s Brief, p. 10.) The fallacy of appellee’s position is that appellant is not required to have a certificate of convenience and necessity by the very terms of the law, and if appellant is in violation, it is in violation *not* of Section 401(a) of the Act, which is the only basis of appellee’s action, but of the Economic Regulations under which exemption was obtained, and which Regulations contain comprehensive and fully adequate provisions for remedy of violations *by the Board*.

As pointed out in the summary, appellee has proven too much. By its argument, a holder of a certificate who operated in violation of any part of the Act would be acting *pro tanto* in excess of authority, and in violation of Section 401(a). Thus, any party in interest by such reasoning could enter the District Court in any case and ignore the Board. Surely no such result is either intended or desirable.

That the Act and the Regulations were intended to mean just what they say—appellant is exempt from Section 401(a)—becomes apparent when other provisions of the Act and of the Regulations are consid-

ered. Section 292.1 of the Economic Regulations contains elaborate and complete provisions for revocation and suspension *upon action by and before the Board*.

A United States District Court case, Southern District of New York, decided October 5, 1948, by Judge Kaufman, *American Air Lines, Inc. v. Standard Air Lines, Inc.* (District Court, Southern District New York, decided October 5, 1948, reported in 2 C.C.H. Aviation Law Reporter, 14,757), is directly in point and so well reasoned that appellant respectfully begs indulgence of the Court to quote the entire opinion as a part and parcel of appellant's reply argument. It reads:

*United States District Court
Southern District of New York*

Civil No. 47-272

American Airlines, Inc.,
Plaintiff,
against
Standard Air Lines, Inc.,
Defendant.

OPINION

Appearances:

Debevoise, Plimpton & McLean, Esqs.,
Attorneys for Plaintiff
American Airlines, Inc.
20 Exchange Place,
New York 5, N. Y.

Edward C. McLean, Esq.
Malcolm A. MacIntyre, Esq.
Of Counsel.

Gewirtz and Maclay, Esqs.
 Attorneys for Defendant,
 1757 K Street, N.W.
 Washington, D. C.

Hardy K. Maclay, Esq.
 Of Counsel.

Milton Winn, Esq.
 Attorney for Defendant
 Standard Airlines, Inc.
 115 Broadway,
 New York 6, N. Y.

O. D. Ozment, Esq.
 Attorney for Civil Aeronautics Board,
Amicus Curiae.

Kaufman, J.

Plaintiff moves to enjoin defendant pendente lite from operating, and from holding itself out to the public as operating regular flights as a common carrier between certain points on the east and west coasts of the United States.

The action is brought for similar permanent relief.

The moving papers allege that plaintiff is an air carrier engaged in air transportation between New York City and Los Angeles, pursuant to certification of public convenience and necessity granted by the Civil Aeronautics Board (hereinafter referred to as the "Board") for regularly scheduled operation between said points; that defendant holds no certificate of public convenience and necessity to engage in air transportation, but is an "Irregular Air Carrier" and the holder of Letter of Registration, No. 826, issued under Sec-

tion 292.1 of the Economic Regulations of the Board. It is then alleged, in substance, that defendant is engaged, and is holding out to the public that it engages, in air transportation between New York City and Los Angeles with a degree of regularity which is not permitted to Irregular Air Carriers; that by its aforesaid actions defendant has exceeded the limits of its authority under Section 292.1 of the Economic Regulations and has thereby forfeited the exemption conferred on Irregular Air Carriers from the requirement of a certificate of public convenience and necessity. Consequently, it is claimed, defendant's operations without such a certificate are illegal and should be enjoined.

There is no dispute as to the number and frequency of defendant's flights, but defendant claims that by virtue of their nature they do not constitute operations of a regularity in excess of those permitted to Irregular Air Carriers.

Apart from the merits, two questions are presented by the motion: first, whether or not plaintiff is "a party in interest" within the meaning of Section 1007(a) of the Civil Aeronautics Act, which gives any "party in interest" the right to apply to the appropriate District Court of the United States for an injunction against violation of the Act; and second, whether or not the Court has jurisdiction of the action.

The papers show that plaintiff, a certificated air carrier, and defendant, the holder of a Letter of Registration as an Irregular Air Carrier, are competing in air transportation between the points involved. This, in my opinion, is sufficient

to make plaintiff a "party in interest" within the meaning of Section 1007(a) of the Act. *Flying Tiger Line v. Atchison T. & S. F. Ry. Co.*, 75 F. Supp. 188.

Section 401(a) of the Act (U.S.C., Title 49, Section 481(a)) provides:

"(a) no air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

Section 1007 of the Act (U.S.C., Title 49, Section 647) provides that if any person violates any provision of the Act, or any regulation thereunder, or any term, condition, or limitation of any certificate or permit issued thereunder,

"the Board, its duly authorized agent, or, in the case of a violation of Section 481(a) of this chapter, any party in interest, may apply to the (appropriate) district court of the United States,"

for the enforcement thereof,

"and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise * * *",

If the foregoing were the only provisions to be considered, it would be clear that an air carrier may not engage in air transportation without a certificate of convenience and necessity, and that if it should do so, any party in interest could apply to the appropriate District Court of the United States for an injunction.

There are, however, other provisions which must be considered.

Section 416(a) of the Act (U.S.C., Title 49, Section 496(a)) authorizes the Board to establish classifications or groups of air carriers, as the nature of the service performed by them shall require, and also to establish such rules and regulations pursuant to and consistent with the provisions of the Act, to be observed by each such class or group, as the Board finds necessary in the public interest. This section, in subdivision (b), authorizes the Board in certain circumstances to

“exempt from the requirements of this subchapter or any provision thereof, * * * any air carrier or class of air carriers, if it finds that the enforcement of this subchapter or such provision * * * is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.”

Acting under this authorization, the Board promulgated Section 292.1 of its Economic Regulations.

Subdivision (b) of this Section provides:

“Classification.—There is hereby established a classification of non-certificated air carriers to be designated ‘Irregular Air Carriers’. An Irregular Air Carrier shall be defined to mean any air carrier (1) which does not hold a certificate of public convenience and necessity under Section 401 of the Civil Aeronautics Act of 1938, as amended, (2) which directly engages in interstate or overseas air transportation of

persons and property or foreign air transportation of property only, and (3) which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniformed pattern or normal consistency of operation between, or within, such designated points."

Subdivision (c) of Section 292.1 of the Economic Regulation, in so far as here material, reads:

"(c) Exemptions.—(1) General.—Except as otherwise provided in this section, Irregular Air Carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, other than the following:"——

and here follow references to the provisions of the Act which are excepted from the exemption. Section 401(a) is not among them.

In other words, Irregular Air Carriers are exempted from the provisions of Section 401(a), the section which requires air carriers to have a certificate of convenience and necessity as a condition of engaging in air transportation. Conse-

quently, air transportation, without such a certificate, by an Irregular Air Carrier to which a Letter of Registration has been issued,¹ would not be a violation of Section 401(a) and would not invest a party in interest with the right, under Section 1007 of the Act, to apply to a District Court for an injunction on the ground that such carrier was violating Section 401(a).

Subdivision (d)(2) of Section 292.1 of the Economic Regulation provides that upon the filing of proper application therefor, the Board shall issue to any Irregular Air Carrier a Letter of Registration

“which, unless otherwise sooner rendered ineffective, shall expire and be of no further force and effect, upon a finding by the Board that enforcement of the provision of Section 401 (from which exemption is provided in this section) would be in the public interest and would no longer be an undue burden on such Irregular Air Carrier or Class of Irregular Air Carriers.”

Subdivisions (d)(4) and (5) of Section 292.1 of the Economic Regulations, read:

“(4) Suspension of Letter of Registration.
—Letters of Registration shall be subject to immediate suspension when, in the opinion of

¹Subdivision (d) of Section 292.1 of the Regulation requires that Irregular Air Carriers procure letters of registration from the Board.

“(1) Letter of Registration required.—From and after sixty days after the effective date of this section, no Irregular Air Carriers may engage in any form of air transportation unless there is then outstanding and in effect with respect to such air carrier a Letter of Registration issued by the Board.”

the Board, such action is required in the public interest.

“(5) Revocation of Letter of Registration.—Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and wilfull violation of any provision of the Civil Aeronautics Act of 1938, as amended, or any order, rule or regulation issued under any such provision, or of any term, condition or limitation of any authority issued under said Act or regulations.”

In May, 1948, the Board issued an order, based upon a motion filed with it by a Board Enforcement Attorney, directing defendant herein to show cause why its Letter of Registration should not be revoked for knowing and wilful violations of the Act, and why the Board should not issue an order requiring defendant to cease and desist from such violations, and why its Letter of Registration should not be suspended during the pendency of the proceeding. By an order of the Board, dated August 24, 1948, the plaintiff herein and certain other air carriers were permitted to intervene in that proceeding. Prior thereto, and on August 4, 1948, the Board, upon the motion papers and the defendant's answer thereto, and upon matters within its official knowledge, including the operational and flight reports theretofore filed by defendant, made an order finding that the defendant had operated numerous flights of such frequency

“as to indicate and imply a normal consistency of operations between points and therefore have exceeded those operations between

designated points deemed to be authorized by section 292.1 of the Economic Regulations”;
 that defendant herein held itself out to the public as operating
 “regular or reasonably regular services between such points”;

that defendant herein had admitted that it had violated the Act in other specified respects. Thereupon the Board ordered that defendant’s Letter of Registration be suspended during the pendency of that proceeding, and assigned the case for public hearing before an examiner of the Board, at a time and place thereafter to be designated.

On September 20, 1948, the United States Court of Appeals for the District of Columbia made an order staying the aforesaid order of the Board pending final disposition of the case, or until further order of the Court in the case. Consequently, in the determination of this motion, defendant’s Letter of Registration must be deemed still in full force and effect.

Since, by reason of Section 1007(a) of the Act, a “party in interest may invoke the court only in cases involving violations of Section 401(a) of the Act, and since Irregular Air Carriers are exempted from the provisions of Section 401(a), the question of jurisdiction of the court in this case depends on whether or not defendant is still an Irregular Air Carrier within the meaning of the Act. This depends on whether a carrier, whose Letter of Registration as an Irregular Air Carrier is still outstanding and in effect, automatically ceases to be an Irregular Air Carrier within

the meaning of the Act if it operates with greater regularity than the court could find permissible for Irregular Air Carriers, or whether, on the other hand, one to whom such a Letter of Registration has been issued continues to be an Irregular Air Carrier within the meaning of the Act until the Board makes a finding that exemption from the requirement of a certificate of convenience and necessity is no longer in the public interest (Economic Regulation 292.1(d)(2)), and suspends or revokes the Letter of Registration. (id. (4)(5).)

What constitutes the operation of air flights “regularly or with a reasonable degree of regularity,” and what constitutes service “of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation” is not defined in the Economic Regulation or the Act; the definition was wisely left flexible because, as the Regulation and the Explanatory Statement promulgated by the Board in connection therewith show, what would constitute “regularity” or “a uniform pattern of normal consistency of operation” might vary with time, place, nature of the flights and other circumstances. Irrespective of the simplicity or complexity of the question in this particular case, it is evident that the question is of a kind that can be a highly technical one, calling for expert knowledge of the industry, and that the Board, which phrased and promulgated the Regulation, and with which operational reports of all irregular air carriers are regularly filed,

“So that it may maintain adequate supervision * * * with respect to exempted operations”,

is much better equipped and qualified to determine it than the Court could possibly be.

It is to the Board alone that the Act gives the authority to classify air carriers; it is to the Board alone that the Act gives the authority to determine that it would be in the public interest to exempt from the operation of provisions of the Act any class of air carriers so created, and, when the Board so finds, to grant them the exemption (Sec. 416); it is the Board alone which was authorized to, and did, promulgate Economic Regulation 292.1, creating the classification "Irregular Air Carriers" and granting them exemption from the requirement of a certificate of convenience and necessity; it is the Board alone which is empowered to make a finding that the continuance of the exemption with respect to any carrier or class of carriers would no longer be in the public interest (Regulation 292.1(d)(4)); it is the Board alone with which operational reports of all carriers are filed (Act, Section 407(a)), which has supervision of such carrier (Act, Section 205(a)) and which is authorized to investigate, hold administrative hearings and make administrative orders with respect to violations of the Act by any carrier (Act, Section 1002), and it is the Board alone which is authorized by the Economic Regulation to suspend any Letter of Registration when, in its opinion, such action is "required in the public interest" (Subd. (d)(4)) and, after notice and hearing, to revoke the Letter ((d)(5)).

Reading the various relevant portions of the Act and of Section 292.1 of the Economic Regulation, and taking into account the public policy behind them, I conclude that it was not intended

that the Courts should, in the first instance, undertake to determine whether or not one who holds a letter of Registration as an Irregular Air Carrier, duly issued by the Board and still in effect, has forfeited the right to operate as such. I can conceive of serious chaos and conflict with the Board if the Courts were to do so. Taking all of these provisions together, I am of the opinion that the question involves matters of public interest in the domain of air transportation—a subject on which the Board is “the final arbiter” (*United States Air Lines v. Civil Aeronautics Board*, 155 F. (2d) 169, 173), and that jurisdiction to make such a determination and decision is, at least initially, in the Board. See *Adler v. Chicago & Southern Air Lines, Inc.* 41 F. Supp. 366, and cases there cited. The *Flying Tiger* case, 75 F. Supp. 188, is not to the contrary. In that case, the carrier against which Court proceedings were invoked had not been classified by the Board; it was operating without any license whatever, either as a regular carrier or as an irregular one. It was, accordingly, clearly in violation of Section 401(a) and subject to injunction proceedings by any party in interest.

In reaching my conclusion, I have not overlooked *Hawaiian Air Lines, Ltd. v. Trans-Pacific Air Lines, Ltd.*, 73 F. Supp. 68. The opinion there indicates that there may have been some points of distinction between that case and this, but, in any event, in so far as the conclusion there is opposed to the one expressed herein, I find myself unable to adopt it.

October 5, 1948.

/s/ Samuel H. Kaufman

United States District Judge

Attention is respectfully invited to the holding of this very recent case, that Judge Kaufman determined that the provisions of the Civil Aeronautics Act exempted an air carrier from Section 401(a) and that therefore the plaintiff as a "party in interest" could not bring a court action. He concluded that the Board alone had jurisdiction to determine the question of whether or not there had been a violation.

The case is essentially identical with the case at bar. The only distinction could be that in the *American Airlines* case the Board had issued an order to show cause, followed by a suspension pending final determination which suspension was stayed by the Court of Appeals. In the case at bar, the Board had not acted. But this element does not in any way affect the reasoning of the case. If any effect is given, it strengthens the application of the rule to the case at bar, since here the Board has neither acted nor *been given opportunity to act*.

The Board in its amicus curiae brief cites several cases on page 16 (top) of its brief, on the bottom of page 17 and top of page 18, and again on page 22, all for the purpose of showing that the federal Courts will take jurisdiction of a violation of an administrative regulation. The Courts not only do so, but are required to do so by law, *in proper cases*. It is to be noted that, in each instance, these are cases brought by the United States or the Interstate Commerce Commission. That the government, or its agency, may enter the Courts to enforce their regulations cannot be questioned. But that is not the case at bar. Here

a "party in interest" is entering under a limited statutory authorization to ask the District Court to determine a question which should properly be determined and acted upon by the Board itself. The case of *Interstate Commerce Commission v. Fordham Bus Corp.*, 38 Fed. Supp. 739 (S.D. N.Y. 1941), particularly referred to by the Board on page 16 of its brief and cited on pages 17 and 22, is illustrative. In this case, the bus company was authorized to operate a special or charter service, and proceeded to run a regular schedule on weekends and holidays and sell tickets. The Interstate Commerce Commission *itself*, under statutory authority, entered the District Court to enjoin the violation of its order. The Commission had delineated the authorized operations of *this particular bus company*. That is not the case at bar. The Board has at no time acted, or had an opportunity to act or determine, whether or not this *particular airline* was violating the promulgated regulations. And *that*, appellant contends, is a primary function of the Board.

To the same result is the effort spent by appellee in its brief on pages 16 and 17, wherein it discusses *Columbia Broadcasting System v. United States* (1942), 316 U. S. 407. In that case, the Federal Communications Commission promulgated a body of regulations under which it *would in the future* determine its action. The broadcasting company challenged the regulations under statutory authority for review. The question was, did the futurity element bar present challenge? Appellee quotes from the case to show

that the federal Courts will consider administrative rulings. There is no doubt but that they do—and do so many times—in *appropriate instances* and on *appropriate* bases. Appellant is contending that this particular case is not one of such cases, and that, appellant being exempt from Section 401(a), the determination in this case was one for the primary consideration of the Board.

II. THE BOARD HAD PRIMARY JURISDICTION TO DETERMINE THE ISSUES OF FACT PRESENTED TO THE DISTRICT COURT.

This brings the discussion to what is in fact the more comprehensive point for the reason that the question of the determination of whether there has been a violation is on good principle and practice within the primary jurisdiction of the Board, and the Civil Aeronautics Act should be construed to so provide.

Where the reasons exist, the rule should exist. In its opening brief, appellant traced the development of the rule of primary jurisdiction, the reasons underlying it, and its application to the case at bar. It was also pointed out in the opening brief that the lower Court did *not* determine a violation of Section 401(a), the only basis upon which appellee can be in court, but in fact and in every real respect, construed and interpreted an economic regulation of the Civil Aeronautics Board. Appellant pointed out the attendant difficulties in which the lower Court found itself by

so doing—the necessity to limit and condition its decree and the writ issued upon future Board action.

Both appellee and the Board in their briefs endeavor to avoid the rule by a contention that the Board had enunciated a measuring stick in the form of both regulation and interpretation, and the rule was thus avoided on the familiar and well-accepted principle that there is not primary jurisdiction in the administrative agency when the Court is only called upon to interpret as a *matter of law* the *words* and *effect* of an administrative order, or to apply such an order as a matter of law.

But that is not the case at bar. And of importance hereto, one of the proofs is in the very brief of the Board. On page 11 of its brief, it says:

“This standard has been designated by the Board, in the Explanatory Statement accompanying the currently effective Section 292.1 (*infra*, p. 39) as a guide to operations permissible under the regulation and has been applied in a number of cases. *Although such standard does not establish a rigid pattern for operations and, consistent with the intent of a regulation permitting irregular operations, permits flexibility in the operation of a particular irregular service*, it nevertheless establishes *definite criteria* whereby it can be determined whether the operations of a carrier are *in fact* being conducted within the limits of the exemption.” * * * (Italics supplied.)

And that is appellant's point. There are “definite criteria” whereby it “can be determined” whether

operations are “*in fact*” within the limits, but that is a *factual* determination to be made by the Board alone in *this particular case*.

It is this *determination* on the basis of *complex facts* that by the dictates of the rule of primary jurisdiction belong peculiarly to the Board. Appellee and the Board refer to the fact that there have been interpretations *by the Board* in *particular cases*. But whether there has been a violation in the *particular case at bar* is one primarily for the Board to also determine on the basis of facts adduced at a hearing on the question. This is far from being action as a *matter of law* of interpretation of an established regulation applicable to this *particular case*, or the interpretation as a matter of law of the wording of an administrative order.

A quotation appearing in the case of *Grace & Co. v. Civil Aeronautics Board* (C.C.A. 2nd, 1946), 154 Fed. (2d) 271, well illustrates the principle involved. Although on its facts, this case is not directly pertinent, this one quotation is pertinent. The case involved an effort on the part of one set of stockholders to require the Board to consider alleged unfair practices of another set. The Board had refused to so act. The Circuit Court in ordering the Board to do so, says on page 282:

“The issue, upon which such a shareholder’s suit would depend, would be whether the Pan American Company was opposing the extension because it was pursuing its own advantage to the prejudice of the joint interest (“fraud”), and

because it was engaging in some demand the same specialized acquaintance with commercial aviation and its ramifications as a decision upon the public convenience and necessity of the extension itself. No court, state or federal, would have that acquaintance; by hypothesis the Board does have it, and the Board alone. To remove the decision from the Board, not only duplicates the time and labor, but subjects the result to the final determination of a relatively incompetent tribunal; for, if the court should decide that the Pan American Company's refusal was neither oppressive, nor unlawful, there would be an end of this proceeding, and of No. 707. It might, however, still be possible for the Board under section 411 to order the Pan American Company to 'cease and desist' from any unfair practices in which the Board—differing from the Court—might think it engaged; but surely such a conflict between court and Board would be to the last degree undesirable, regardless of the possible insufficiency of the available remedies. For these reasons it seems to us that in the proceeding the Board had power to determine, as between Grace & Company and the Pan American Company, which should speak for Panagra. Needless to say, we suggest nothing as to the proper outcome of that inquiry."

In its opening brief, appellant pointed out that the rule is dictated by the necessity of uniformity of decision, both as between different persons, and the same person in different courts, *flexibility of decision* (admitted by the Board), and future action by the administrative body (admitted in the lower Court's

decree) and the requirement of expert knowledge commented upon above.

On page 27 of the amicus curiae brief of the Board, the statement is made: "Specifically, the doctrine of primary jurisdiction applies to such questions as the reasonableness of a rate or the fairness of a rule or a practice." This is not the correct criterion. As a practical matter, many of the cases in which the rule is applied are of such a nature. But appellee in its brief quotes from *Great Northern R. Co. v. Merchants Elevator Company* (1922), 42 S. Ct. 477, 259 U. S. 285, 66 L. Ed. 943 (pp. 25 and 26 of appellee's brief) which case is also quoted by appellant (pp. 13, 14 and 15) and therein Justice Brandeis says:

"But, ordinarily, the determining factor is *not* the character of the *function*, but the character of the controverted question and the *nature* of the *inquiry necessary for its solution*." (Italics supplied.)

Thus in this case, if the inquiry is one of involved fact and requires expert knowledge, the reason of the rule is there.

Further, Justice Brandeis says:

"To determine what rate, rule, or practice shall be deemed reasonable *for the future* is a legislative or administrative function." (Italics supplied.)

The element of future action applies with particular force to the case at bar, as evidenced by the lower Court's difficulties with that very point.

On page 31 of its brief, the Board also refers to the *Great Northern* case in a footnote. But, taken with the preceding context of the case, the quotation appearing in the brief of the Board will be found to apply to the interpretation of the *wording* of a *tariff* as a *matter of law*.

The important element which distinguishes all of the cases cited by appellee and the Board as exceptions to the rule and the case at bar is that, in the case at bar, there must be an extensive *factual* determination to find if this *particular* airline is *in fact* in violation of the regulation—an inquiry which most peculiarly supplies the basic reasons underlying the existence of the rule. The Board in its brief has admitted that there is no fixed standard. Its application to a particular situation is not only one of fact, but one of flexibility (p. 11 of the Board's brief, quoted *supra*).

Both appellee and the Board refer to an alleged attitude of the Board in sustaining their respective positions. This is a remarkably self-serving argument. It is respectfully submitted that it is a basic judicial function to guide the administrative agency as to its proper functions and duties, if there has been a misinterpretation by it of the basic principles involved. The contentions of appellant lead to orderly and consistent administrative operation, and are premised upon a long development of administrative practice.

The Board in its brief states that an application of the primary jurisdiction rule and holding appellant to be exempt from Section 401(a) and thus outside

the provisions of 1007(a) insofar as being subject to a suit by “a party in interest” would nullify the provisions of Section 1007(a) (pages 6 and 25 of the Board’s brief). Such a statement is entirely without foundation. In the first place, the case at bar involves the bringing of a suit “by a party in interest,” only permitted by the statute when there has been a violation of Section 401(a). And this suit is brought without any recourse to the Board. The appellant has been issued a Letter of Registration for operations under the regulatory power of the Board. *By Section 416, appellant is thus exempted from Section 401(a).* (See *American Airlines v. Standard Airlines*, supra.) The determination of whether there has been a violation involves administrative discretion after the hearing of a large body of operational facts, and the Board has a wide latitude of decision—administrative discretion. To urge that the Board is the proper tribunal in this specific situation, does not in any way deprive the courts of power to act after the decision by the Board, to enjoin if the Letter of Registration is revoked or suspended, or to enforce any other order of the Board.

In *Pacific Northern Air Lines v. Alaska Air Lines* (District Court, Alaska, Third Division A4768, decided August 7, 1948) referred to and quoted from by the Board in its brief, there had been an order to show cause issued by the Board, followed by a “cease and desist” order. Plaintiff then instituted a Court proceeding as “party in interest”. The Court followed the reasoning of the lower Court in the case at bar that there was a *pro tanto* violation of

Section 401(a). But as a consequence the Court later found itself in trouble. For when the defendant endeavored to show that its operations were *in fact* within the policy of the exemption, the Court was forced to refuse consideration of the defense on the *basis that such a determination was within the primary jurisdiction of the Board*, expressing the very reasons which have been outlined in appellant's briefs.

This is an excellent illustration of the basic error of the lower Court's position. In accepting jurisdiction of a *part* of the case, the Court was unable to consider *all* of the case. Had the Court recognized the fundamental primary jurisdiction of the Board, for which appellant is contending, such situations cannot arise, and the established principles of orderly administrative procedure are adhered to.

Appellant desires to strongly urge that the decision reached by Judge Kaufman in *American Airlines, Inc. v. Standard Air Lines, Inc.* (see *supra*) (decided October 5, 1948), expresses the correct and salutary conclusion as to the contentions made by appellant, and that this Court should reject the unsound conclusions reached by the lower Court in the case at bar and on appeal here, and should also reject the conclusion reached by the lower Court in the earlier decision of *Pacific Northern Air Lines v. Alaska Air Lines* (District Court, Alaska, Third Division, A4768, decided August 7, 1948), referred to by the Board, in which case the Court was considerably persuaded by the case at bar.

CONCLUSION.

For all the foregoing reasons, it is respectfully submitted that the judgment and order of the District Court was, and in all respects is, error, and appellant respectfully prays that the judgment and decree be reversed, the writ of injunction be ordered vacated, and the matter remanded with a direction of dismissal.

Dated, San Francisco, California,
November 29, 1948.

SAI CHOW DOO,
FREDERICK L. HEWITT,
COATES LEAR,
Attorneys for Appellant.

POWELL, LEAR & GAINES,
FONG, MIHO & CHOY,
Of Counsel.

No. 11,865

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TRANS-PACIFIC AIRLINES, LTD.

(a corporation),

Appellant,

vs.

HAWAIIAN AIRLINES, LIMITED

(a corporation),

Appellee.

**On Appeal from the District Court of the United States
for the Territory of Hawaii.**

APPELLEE'S PETITION FOR A REHEARING.

J. GARNER ANTHONY,

312 Castle & Cooke Building, Honolulu 1, Hawaii,

*Counsel for Appellee
and Petitioner.*

ROBERTSON, CASTLE & ANTHONY,

312 Castle & Cooke Building, Honolulu 1, Hawaii,

Of Counsel.

FILED

APR 6 - 1949

PAUL P. O'BRIEN

Table of Authorities Cited

Cases	Pages
Brown v. Schwartz, 261 U.S. 216 (1923)	3
Heitmuller v. Stokes, 256 U.S. 359 (1921)	3
Matheus v. United States, 282 U.S. 802 (1930)	3
NATS Air Transportation Service, CAB Docket 3456, 2 CCH Av.L.R. para. 21,149, decided Feb. 10, 1949	2

Miscellaneous

CAB Regulations, Serial No. 394; 12 Fed. Reg. 4247 (1947)	2
Civil Aeronautics Act of 1938, as amended, 49 U.S.C., Sec- tion 401 et seq. 52 Stat. 973 et seq.:	
Section 401(a)	2, 3
Section 1007(a)	2
Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Sections 250, 291	3

No. 11,865

IN THE
United States Court of Appeals
For the Ninth Circuit

TRANS-PACIFIC AIRLINES, LTD.

(a corporation),

Appellant,

vs.

HAWAIIAN AIRLINES, LIMITED

(a corporation),

Appellee.

On Appeal from the District Court of the United States
for the Territory of Hawaii.

APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

We respectfully petition the Court for a rehearing
upon the following grounds:

1.

That this Court has erroneously:

(a) Held that the letter of registration (R. 80)
conferred an exemption on appellant and overlooked

the fact that its issuance was a routine function involving no exercise of discretion;¹

(b) Failed to distinguish between regulations of general and regulations of particular applicability;

(c) Held that questions of appellant's economic status were involved in determining whether appellant was exempted;

(d) Held that the District Court should have refused to follow the plain mandate of Section 1007(a) of the Act which requires it to issue an injunction for violating Section 401(a) of the Act.

2.

After submission of this case the Civil Aeronautics Board² expressly held that a letter of registration did not confer an exemption from the provisions of Section 401(a) of the Act, directly contrary to the conclusion reached by this Court.

3.

On November 29, 1948, the Civil Aeronautics Board rendered its decision awarding a certificate of public convenience and necessity to appellant under Section 401(a) of the Act. The order authorizing the issuance of certificate was signed by the President and made public on February 17, 1949. It is effective sixty days from date. The decree below restrains ap-

¹CAB Regulations, Serial No. 394; 12 Fed. Reg. 4247 (1947).

²NATS Air Transportation Service, CAB Docket 3456, 2 CCH Av.L.R. para. 21,149, decided Feb. 10, 1949.

pellant's operations in violation of Section 401(a) of the Act. It follows that the above cause is moot.

In these circumstances the appropriate procedure for this Court is to vacate its judgment entered March 18, 1949, and remand the case to the District Court with instructions to dismiss the complaint upon the ground that the case is moot.

Brown v. Schwartz, 261 U.S. 216, 218 (1923) ;
Matheus v. United States, 282 U.S. 802 (1930) ;
Heitmuller v. Stokes, 256 U.S. 359 (1921) ;
 Robertson and Kirkham, *Jurisdiction of the
 Supreme Court of the United States*, Sections
 250, 291.

Dated, Honolulu, Hawaii,
 April 1, 1949.

Respectfully submitted,
 J. GARNER ANTHONY,
*Counsel for Appellee
 and Petitioner.*

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for a Rehearing, in my judgment, is well founded and is not interposed for delay.

Dated, Honolulu, Hawaii,
April 1, 1949.

J. GARNER ANTHONY,
*Counsel for Appellee
and Petitioner.*

No. 11866

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALFRED GLEN SYMONS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

FILED

OCT 22 1948

JAMES M. CARTER,

United States Attorney,

NORMAN W. NEUKOM,

Assistant U. S. Attorney,

CAMERON L. LILLIE,

Assistant U. S. Attorney,

600 U. S. Postoffice and Court House Building,
Los Angeles 12, California

Attorneys for Appellee.

PAUL P. O'BRIEN,
CL

TOPICAL INDEX

	PAGE
Statement of the case.....	1
Statement of facts.....	2
Argument	6

I.

Provision of the Fourth Amendment forbidding unreasonable searches and seizures is a limitation on government agencies and officers and is not directed to misconduct of state officers	6
---	---

II.

The arrest of the defendant did not violate the Fourth and Fifth Amendments to the Constitution of the United States	12
--	----

III.

The trial court did not err in the admission of the statements of the defendant.....	16
--	----

IV.

The evidence was sufficient to support the conviction upon Count One of the indictment.....	19
Conclusion	21

TABLE OF AUTHORITIES CITED

CASES	PAGE
Aldridge v. United States, 67 F. 2d 956.....	9
Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746, 6 S. Ct. 524	9
Bram v. United States, 168 U. S. 532.....	16
Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159.....	9, 10
Byars v. United States, 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520	10, 12
Carroll v. United States, 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280	12, 13
Derskov v. United States, 4 F. 2d 540.....	9
Edgmon v. United States, 87 F. 2d 13.....	9
Elk v. United States, 17 U. S. 529, 44 L. Ed. 874, 20 S. Ct. 729	13
Feldman v. United States, 322 U. S. 487, 64 S. Ct. 1082.....	10
Gambino v. United States, 275 U. S. 310, 48 S. Ct. 137, 72 L. Ed. 293, 52 A. L. R. 1381.....	10
Grice v. United States, 146 F. 2d 849.....	9
Hardy v. United States, 186 U. S. 224.....	16
Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. Ed. 262.....	18
Kurtz v. Moffitt, 115 U. S. 487, 29 L. Ed. 458, 6 S. Ct. 148.....	13
Miller v. United States, 50 F. 2d 505.....	9
Pierce v. United States, 160 U. S. 355.....	16
Powers v. United States, 223 U. S. 303.....	16
Rettich v. United States, 84 F. 2d 118.....	9
Schroeder v. United States, 7 F. 2d 60.....	9
Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426.....	10
Sparf and Hanson v. United States, 156 U. S. 51.....	16
Trupiano et al. v. United States (decided June 14, 1948, No. 427, Oct. term 1947, 16 L. W. 4589).....	11

	PAGE
Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97	9
United States v. Anne Johnson, 333 U. S. 10, 92 L. Ed. (No. 8) 323	11
United States v. Diuguid, 146 F. 2d 848.....	10
United States v. Di Re, 332 U. S. 581, 92 L. Ed. (No. 6) 281	11, 12
Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652	9
Wilson v. United States, 162 U. S. 613.....	16

STATUTES

California Penal Code, Sec. 836.....	14
California Penal Code, Sec. 837.....	14
California Penal Code, Sec. 841.....	15
California Penal Code, Sec. 844.....	14
United States Code, Title 5, Sec. 300A.....	12, 13
United States Code, Title 19, Sec. 1593(b).....	1
United States Code, Title 26, Sec. 2590(a).....	1, 20
United States Code, Title 26, Sec. 2593(a).....	13, 19, 20
United States Code, Title 28, Sec. 503.....	12
United States Code, Title 28, Sec. 504.....	12
United States Code Annotated, Title 26, Sec. 2591.....	20
United States Code Annotated, Title 26, Sec. 2592(a).....	19
United States Code Anontated, Title 26, Sec. 3233.....	20
United States Constitution, Fourth Amendment.....	21
United States Constitution, Fifth Amendment.....	21

No. 11866

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALFRED GLEN SYMONS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

Statement of the Case.

The defendant and appellant herein, Alfred Glen Symons, was indicted on two counts. Count One charges him with violating Title 26, United States Code, §2590(a) Count Two charges the defendant with violating Title 19, United States Code, §1593(b). The date of the alleged violation was on or about December 6, 1947. The narcotics involved consisted of approximately 1 pound, 3 ounces, 327 grains of bulk marihuana and 214 marihuana cigarettes.

Statement of Facts.

Appellant's opening brief does not contain a true, accurate or fair statement of the facts. Therefore, for the Court's consideration we respectfully submit the following statement.

On December 5, 1947, two police officers of the Manhattan Beach Police Department, Charles Frederick Grau and Brent Gray [T. 56],* responding to a call, made an investigation at the Ryan Motel [T. 16, 56]. At the request and with the permission of the landlady, they made a search of the premises [T. 20, 56, 57, 59] and found in a room of the motel a package of Zig-Zag cigarette papers [Government's Exhibit 2; T. 17, 18, 53, 59, 77] and a pillow slip [Government's Exhibit 3; T. 17, 18, 21, 53, 57] which contained fragments [Government's Exhibit 9; T. 76, 77, 78] of marihuana [T. 140, 141].

The car driven by the occupants of the room of the motel [T. 25, 63] was a Cadillac, License No. 8 J 813 [T. 26, 103] and was later identified as the defendant's car [T. 106]. An all-points broadcast was given by the officers to locate the car [T. 26, 63] and a call regarding it was received from the El Segundo Police [T. 26]. Police Officers Foster, Grau and Gray (in the uniform of the Manhattan Beach Police Department) accompanied by Sgt. Barr, a detective of the Los Angeles Police Department (in plain clothes), proceeded to 814 Bungalow

*Note: Unless otherwise indicated by the volume number, all transcript pages referred to will be contained in Volume II.

Street in El Segundo, California [T. 28, 64, 95], arriving there sometime between 12:30 and 1 A. M. [T. 28, 35, 66, 85].

Sgt. Barr went to the front door with Officer Foster [T. 64, 96]. Police Officer Grau stationed himself at the rear of the house [T. 27, 64]. A conversation took place between Sgt. Barr and one of the occupants of the house [T. 64, 86, 87, 96]. Sgt. Barr stated to the occupants that they were police officers and when he heard sounds which appeared to be running in the house he hammered on the door three or four times and said, "Open up the door. We are going to bust it down" [T. 64, 96]. At that moment Officer Foster went to the northwest corner of the house to cover it [T. 87] and Officer Grau in the rear of the house saw the Venetian blind at the back window open up, then the window opened and he saw the defendant standing in the window. Officer Grau asked the defendant to open the front door because there were officers there [T. 27]. The defendant refused to do so. Sgt. Barr then picked up a flower pot and tossed it through the window in the front of the house and, reaching through the hole, unlatched the window, thereafter entering the house and opening the door for Officer Foster to enter [T. 96, 97]. The other officers came into the house and the defendant and his brother Raymond were apprehended and handcuffed [T. 65, 98]. A search of the house was made and over a small clothes closet [T. 83, 98], in the attic, with Officer Foster present, Sgt. Barr found a brown paper shopping bag [Government's Exhibit 4; T. 82, 99], which

was carried out to the livingroom where the defendant and his brother were seated, with the remaining officers present [T. 91, 92]. The shopping bag contained 12 sealed Prince Albert cans [Government's Exhibit 5; T. 37, 38, 83, 100], each can containing marihuana [T. 140]; a manila bag containing scotch tape and cigarette papers [Government's Exhibit 6; T. 39]; a manila envelope containing 199 cigarettes [Government's Exhibit 7; T. 40] made of marihuana [T. 141]; and an envelope containing 14 cigarettes [Government's Exhibit 8; T. 41] made of marihuana [T. 141].

Detective Sgt. Barr, at approximately 2 o'clock, phoned from 814 Bungalow Street, in the defendant's presence, to the Federal Building in Los Angeles and obtained the residence telephone number of Federal Narcotic Agent Craig. He called Craig and explained the circumstances and who he had in custody, and asked him to come on out [T. 104, 105, 110, 187].

(It was stipulated between defendant's counsel and Government's counsel that William J. Craig is an employee of the Federal Narcotics Bureau of the Treasury Department, the agent in charge, and that he received a phone call from Detective Sgt. Barr of the Los Angeles Police Department and that Theodore J. Heine is another Federal Narcotic Agent).

Craig and Heine arrived at 814 Bungalow Street, El Segundo, between 3:30 and 4 o'clock A. M. [T. 43, 90, 105, 112, 124]. Craig knocked on the door and they were admitted by Detective Sgt. Barr [T. 44, 112, 120]. The

police officers then turned over to Narcotic Agent Craig and Narcotic Agent Heine the Government Exhibits [T. 75, 107, 110, 111, 120, 122, 136].

The police officers and narcotic agents then left the residence at 814 Bungalow Street and proceeded to the Manhattan Beach Police Station with the defendant and his two brothers [T. 46, 76, 108, 115], the second brother having arrived at 814 Bungalow Street during the interim that the police officers were awaiting the arrival of Craig and Heine [T. 106, 198].

Narcotic Agents Craig and Heine thereafter proceeded from the Manhattan Beach Police Station with the three brothers in custody, and the marihuana, to the Federal Building in Los Angeles [T. 136, 200, 203].

Narcotic Agent Craig had several conversations with the defendant [T. 123]; one when he first arrived at 814 Bungalow Street, which was very brief [T. 124]; the second, at Manhattan Beach Police Station for approximately 15 or 20 minutes [T. 128]; and the third was at the office of the Bureau of Narcotics in the Federal Building at Los Angeles [T. 129]. The defendant admitted ownership of the marihuana [T. 133, 134, 190]. The two brothers of the defendant were released [T. 134] and the defendant was booked in jail [T. 137]. The defendant was not struck nor threatened by the police officers nor by the narcotic agents [T. 176, 178, 181, 183, 184, 185, 188, 193, 199, 200, 202, 203, 206, 207, 208, 209].

ARGUMENT.

I.

Provision of the Fourth Amendment Forbidding Unreasonable Searches and Seizures Is a Limitation on Government Agencies and Officers and Is Not Directed to Misconduct of State Officers.

The evidence discloses that, after being placed under arrest by the State officers in his home on December 6, 1947, the defendant was turned over to the custody of the Federal officers, with the narcotics seized at the time of his arrest, and was thereafter indicted on December 17, 1947. Appellant's attorney filed a timely motion on January 29, 1948, to suppress the evidence [Vol. I, T. 5, 6, 7], supported by the affidavit of the defendant [Vol. I, T. 10], wherein the appellant swears that the police officers breaking into the premises were representing Federal Government. Thereafter, on February 2, 1948, the Government filed its motion in opposition to the defendant's motion to suppress evidence which was supported by the affidavit of Detective A. M. Barr of the Los Angeles Police Department [Vol. I, T. 14], one of the police officers who broke into the defendant's premises and arrested him, along with affidavits of William C. Craig [Vol. I, T. 18] and Theodore J. Heine [Vol. I, T. 22], narcotic agents of the Bureau of Narcotics, United States Treasury Department. Barr in his affidavit states that neither the police officers of Manhattan Beach or Barr himself represented the Federal Government and had identified themselves, after entering the house, as police officers of the Los Angeles Police Department and the Manhattan Beach Police Department; that prior to the arrest and seizure of the evidence no knowledge of the arrest was had or given agents of the Federal Bureau; and that the first informa-

tion received by Narcotic Agents Craig and Heine concerning the arrest of the defendant and the seizure of the narcotics was two hours after the arrest had taken place. This was further supported by affidavits of Narcotic Agents Craig [Vol. I, T. 18] and Heine [Vol. I, T. 20]. Defendant's motion to suppress the evidence, after hearing and argument, was denied [T. 6].

Counsel's first argument (paragraph 1, page 7) fails completely because it is based upon the false premise that the State officers acted as Federal agents and in cooperation with the Federal officers. The record in no way supports such a conclusion and, as a result, appellant's contention (page 7) is wholly without merit and falls on its own weight.

The trial court found on uncontradicted evidence that the narcotic agents did not act in concert with the Manhattan police officers or the Los Angeles police officers. The arrest and entry into the premises at 814 Bungalow Street by the State officers occurred between the hours of 12:30 and 1 A. M. and thereafter the narcotics were found. The first knowledge the narcotic agents had of the arrest of the defendant and the seizure of the narcotics was subsequent to the telephone call to the Federal Building at 2 A. M. of the same morning by a Los Angeles police detective, Sgt. Barr. Indicative of the lack of knowledge is the fact that Detective Sgt. Barr did not have Narcotic Agent Craig's telephone number and talked to the operator in the Federal Building in Los Angeles, telling her of the urgent need to get in touch with Craig. Thereafter, the

operator called Detective Sgt. Barr and gave him Narcotic Agent Craig's residence telephone number. After Barr's call, Narcotic Agents Craig and Heine arrived at 814 Bungalow Street at 3:15 A. M., knocked on the door and then were admitted by Detective Sgt. Barr. Whereupon, the defendant and the narcotics were turned over to the narcotic agents.

The facts and circumstances leading to the arrest of the defendant and the seizure of the narcotics by the State officers do in themselves indicate that the State officers were acting "on their own"—the answer to the call from the Ryan Motel and the search of the premises made at the request of the landlady, wherein Government's Exhibits 2, 3 and 9 were found, was a routine Manhattan Beach police call; the all-points radio broadcast given by the officers of the Manhattan Beach police officers in an attempt to locate the defendant's car; the locating of the car by the El Segundo police at 814 Bungalow Street; the arrival of Detective Sgt. Barr of the Los Angeles Police Department in response to a call from the Manhattan Beach Police Department; the arrest of the defendant and the seizure of the narcotics—all show a chain of events unplanned, leading up to the arrest of the defendant and the seizure of the narcotics by the police officers, with a complete lack of knowledge of the events on the part of the Federal narcotic agents.

It is well settled law that the protection of the Fourth Amendment extends to all equally and, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search and seizure made in violation of his rights under the Fourth Amendment. The prohibition applies only to

the National Government and its agencies and does not reach out to alleged misconduct of individual State officers.

Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652;

Edgmon v. United States, 87 F. 2d 13, 15;

Boyd v. United States, 116 U. S. 616; 29 L. Ed. 746, 6 S. Ct. 524;

Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159;

Aldridge v. United States, 67 F. 2d 956;

Schroeder v. United States, 7 F. 2d 60;

Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97;

Rettich v. United States, 84 F. 2d 118.

“Evidence secured through unlawful search and seizure by the state officers not acting directly or indirectly in behalf of the United States, is admissible in a prosecution in the national courts.”

Edgmon v. United States, *supra*;

Burdeau v. McDowell, *supra*;

Aldridge v. United States, *supra*;

Derskov v. United States, 4 F. 2d 540;

Miller v. United States, 50 F. 2d 505;

Schroeder v. United States, *supra*.

In *Grice v. United States* (146 F. 2d 849), the Court said:

“One case arose out of a seizure of coupons made at or near Fayetteville, N. C., when the car in which defendant was riding was stopped by state officers,

who were engaged in checking automobiles for motor vehicle violations. In the course of a search conducted by the state officers the counterfeit coupons were discovered in defendant's pocketbook. There is nothing in the record to indicate that the state officers were acting in cooperation with the Federal authorities or that the latter had anything whatever to do with the stopping of defendant's car or the search of his pocketbook. This being true, there was no error in admitting the coupons in evidence in a federal prosecution."

Feldman v. United States, 322 U. S. 487, 492, 64 S. Ct. 1082;

Gambino v. United States, 275 U. S. 310, 317, 48 S. Ct. 137, 72 L. Ed. 293, 52 A. L. R. 1381;

Byars v. United States, 273 U. S. 28, 33, 47 S. Ct. 248, 71 L. Ed 520;

Burdeau v. McDowell, *supra*;

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426.

In *United States v. Diuguid* (146 F. 2d 848):

"The court found on uncontradicted evidence that the federal agents did not act in concert with the police officers and that the federal officers knew nothing about the raid until it had been made. This is enough to establish those facts. *United States v. Nardone*, 2 Cir., 127 F. (2d) 521. It follows that whether the search and seizure by the police was lawful or not the evidence was admissible against the

appellant. *Burdeau v. McDowell, supra.* When federal officers are not guilty of misconduct, evidence will not be suppressed merely because it was unlawfully seized by the police before the federal officers took possession of it. *Miller v. United States*, 3 Cir., 50 F. (2d) 505.”

The cases cited by the appellant in an attempt to sustain his position, which are palpably unsound, are distinguishable from the case at bar in the following respects. In *United States v. Di Re* (332 U. S. 581, 92 L. Ed (No. 6) 281), the search and seizure made by the State officers was in conjunction with a Federal officer who did not have power to arrest, and the state officer arresting Di Re arrested him without a warrant for the commission of a misdemeanor not committed in the presence of the arresting officer in violation of the New York Penal Code. Likewise, in *United States v. Anne Johnson* (333 U. S. 10, 92 L. Ed. (No. 8) 323), a Federal officer was involved in the arrest and acted in conjunction with the State officers. The opinion in the case of *Trupiano et al. v. United States* (decided June 14, 1948, No. 427, Oct. Term 1947, 16 L. W. 4589), discloses that the search and seizure without a warrant was conducted wholly by agents of the Federal Government. In the present case neither Narcotic Agent Craig nor Narcotic Agent Heine participated in the search of the home of the defendant. It is therefore submitted that the right of Federal Government cannot be questioned in availing itself of evidence improperly seized by State officers operating entirely upon their own.

II.

The Arrest of the Defendant Did Not Violate the Fourth and Fifth Amendments to the Constitution of the United States.

In both the *Byars* and *Di Re* cases cited by the appellant to sustain his position, the arrests were made in conjunction with an illegal search and seizure wherein Federal agents participated. The record shows this is not so in the case at bar.

The principles of the common law govern and define when an arrest without a warrant may be made for an offense against the United States. The police officers of the Federal Government are the Marshals and their deputies,¹ the members of the Division of Investigation of the Department of Justice,² the special agents attached to The Customs Investigation Unit, The Customs Patrol, The Coast Guard, The Bureau of Narcotics, The Alcohol Tax Unit Enforcement Division, The Secret Service, The Bureau of Internal Revenue Intelligence Unit, The Post Office Inspectors, and The Immigration Border Patrol of the Labor Department.

Carroll v. United States, 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280.

It is well settled that an officer or private person may arrest a person for a misdemeanor without a warrant only when the misdemeanor has been committed in his presence; they may likewise without a warrant arrest a person who has in fact committed a felony; and a police officer only

¹28 U. S. C., §§503, 504.

²5 U. S. C., §300A.

may arrest without a warrant a person believed by him upon reasonable cause to have been guilty of a felony.

Carroll v. United States, supra;

Kurtz v. Moffitt, 115 U. S. 487, 29 L. Ed. 458, 6 S. Ct. 148;

Elk v. United States, 17 U. S. 529, 44 L. Ed. 874, 20 S. Ct. 729;

5 U. S. C. §300A.

Assuming for the sake of argument only, but certainly not conceding that the arrest of the defendant by the State officers was not valid, the following *quare* would arise, did it affect the arrest of the defendant made by Federal Narcotic Agents Craig and Heine? Upon receipt of the telephone call from Sgt. Barr on the morning of the arrest there was no question in the minds of the narcotic agents that a felony had been committed by the defendant by reason of his possession of the narcotics in violation of a Federal Act (Title 26, U. S. C. §2593(a).) In view of their direct knowledge that the defendant possessed narcotics, the narcotic agents not only had probable cause to believe that a felony had been committed by the defendant but had actual knowledge of its commission from the information given Narcotic Agent Craig by Sgt. Barr over the telephone.

The appellant proceeds on the theory that the Government must sustain the validity of the arrest by the State officers. This is not necessary. Incidentally, however, the validity of the arrest by the State officers can be sustained. The police officers were members of the Manhattan Beach police force and the Los Angeles police force, and arrest of the defendant and seizure of the narcotics occurred in the City of El Segundo. Whether or not the State officers

acted in the capacity of peace officers or as private persons is not material to our argument as both have the same rights in making arrests under §836³ of the California Penal Code (Arrest by peace officers, paragraphs 2 and 3) and §837⁴ of the California Penal Code (Arrest of private persons, paragraphs 2 and 3), with the peace officers having additional rights with respect to an arrest for a felony at night, under paragraph 5 of §836. The finding of the fragments of marihuana at the Ryan Motel by the police officers gave them reasonable cause to believe that a felony had been committed (*i. e.*, possession of marihuana) and was being committed. The obtaining of the license number of the defendant's car and the tracing of the car to the defendant's address at 814 Bungalow Street, El Segundo, logically supports the position of the police officers that they had probable cause to believe that the defendant had committed and was committing a felony in possessing the narcotics.

Section 844 of the California Penal Code reads:

“Arrests, entries for. To make an arrest, a private person, if the offense be a felony, and in all cases a

³§836. Arrest by peace officers. A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person: 1. For a public offense committed or attempted in his presence. 2. When a person arrested has committed a felony, although not in his presence. 3. When a felony has been in fact committed and he has reasonable cause for believing the person arrested to have committed it. 4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested. 5. At night, when there is a reasonable cause to believe that he has committed a felony.

⁴§837. Arrest of private persons. A private person may arrest another: 1. For a public offense committed or attempted in his presence. 2. When the person arrested has committed a felony, although not in his presence. 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.”

Before breaking into the house Detective Sgt. Barr knocked on the door several times and talked with a person inside. Sgt. Barr stated that they were police officers, requested admission, and informed the occupants that unless they opened the door he would break in. Then, after hearing what sounded like persons running in the house, he again demanded admittance and waited approximately 30 seconds after that before breaking in the window to open the door.

Appellant raises the further point that the police officers in making the arrest failed to inform the defendant of their intention to arrest him, of the cause of the arrest, and of their authority to make it, overlooking the exceptions set out in §841⁵ of the California Penal Code that such is not necessary when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, such as the defendant in this case was doing in possessing narcotics.

⁵§841. Arrest, how made. The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape.

III.

The Trial Court Did Not Err in the Admission of the Statements of the Defendant.

“It is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary it is sufficient though it appears that he was not so warned.”

Powers v. United States, 223 U. S. 303;

Hardy v. United States, 186 U. S. 224;

Bram v. United States, 168 U. S. 532;

Wilson v. United States, 162 U. S. 613;

Pierce v. United States, 160 U. S. 355;

Sparf and Hanson v. United States, 156 U. S. 51.

The testimony at the time of the trial showed that Narcotic Agent Craig had three conversations with the defendant on the morning of the arrest. The first was a brief conversation lasting two or three minutes at 814 Bungalow Street [T. 127, 128], a second conversation, for ten or fifteen minutes was had at the police station at Manhattan Beach [T. 128, 129] and a third conversation occurred in the Federal Building at Los Angeles [T. 131]. Agent Craig testified regarding the third conversation as follows:

A. I asked Agent Heine to bring the defendant into my office. They came in together. And at that time I told him that I intended to release his brothers and prefer no charges against them.

And I then asked him if he had anything to say about the marihuana. He replied, “It is mine.”

I then told him I was taking his brothers back to Manhattan Beach and that Agent Heine would take him to the County jail.

Q. After that did you have any further conversation with him? A. On two occasions during the month of January 1948.

Q. Who was present? A. Agent Heine.

Q. Was the defendant present? A. He was.

Q. Where did they take place? A. In the Narcotic office.

The defendant stated he had purchased the marijuana seized in this case from a man known as Chungo who lived on the east side of Los Angeles. And he stated he was willing to assist the Narcotic Bureau in apprehending him.

This last statement, in January 1948, was made over a month subsequent to the filing of the indictment and the defendant's arraignment before a Commissioner. It logically follows that the defendant, having made this statement voluntarily in the Narcotic office in January of 1948, made his admission of the ownership of the marijuana on the morning of the arrest freely and voluntarily. As a matter of fact, the testimony of Agent Craig indicates clearly that he had told the defendant that he was going to release his two brothers prior to the defendant's admission of ownership of the marijuana [T. 133].

When called on rebuttal, the State officers and the narcotic agents testified that the defendant was not struck nor threatened at any time [T. 176].

The admissibility of such evidence was a question for the trial court to determine in the exercise of sound discretion.

Hopt v. Utah, 110 U. S. 574, 583, 4 S. Ct. 202, 28 L. Ed. 262.

In *Hopt v. Utah*, *supra*, the Supreme Court of the United States, on page 584 (4 S. Ct. 207), concerning the confessions of an accused, said:

“A confession if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C. B., 1 Leach 263, ‘is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers.’ Elementary writers of authority concur in saying that, while from the very nature of such evidence it may be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession”—citing 1 Greenleaf, Ev. §215; 1 Archbald, Cr. Pl. 125; 1 Phillips’, Ev. 533, 534; Starkie, Ev. 73.

The trial court determined that the statements and admissions made by the defendant were free and voluntary and we submit the evidence bears out the fact that the trial court ruling was correct.

IV.

The Evidence Was Sufficient to Support the Conviction Upon Count One of the Indictment.

The defendant was found guilty on both counts of the indictment and sentence was imposed upon him the 18th day of February, 1948, whereby he was given two years on each of the counts, to be served concurrently. The Government will therefore not attempt to sustain its position on the second count and will admit error, as such error will not affect the sentence given under the first count.

In compliance with §2593 of Title 26, U. S. C. A.,¹ the violation of which the defendant was found guilty, the Deputy Collector served upon the defendant a notice and demand [Government's Exhibit 1] for the defendant to produce the order form required by §2592(a).² And the defendant's failure to produce the order form so required

¹§2593. Unlawful possession. (a) Persons in general. It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590(a).

²§2591. Order forms. (a) General requirement. It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary.

is presumptive evidence of his guilt under this section and of liability for the tax imposed by §2590(a).³

The Deputy Collector, in fact, testified that prior to serving the notice and demand upon the defendant he had made a search of the records required to be preserved under the provisions of §2591 and section 3233 of Title 26, U. S. C. A.,⁴ and found no record of the defendant having filed a registration card as a dealer in narcotics.

It is therefore submitted that the defendant did not rebut the presumption of the evidence of guilt under §2593, Title 26, U. S. C. A. and the evidence was sufficient to sustain Count One of the indictment.

³§2590. Tax. (a) Rate. There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 2591 to be carried out in pursuance of written order forms taxes at the following rates: (1) Transfer to special taxpayers. Upon each transfer to any person who has paid the special tax and registered under sections 3230 and 3231, \$1 per ounce of marihuana or fraction thereof. (2) Transfers to others. Upon each transfer to any person who has paid the special tax registered under sections 3230 and 3231, \$100 per ounce of marihuana or fraction thereof.

⁴§3233. Returns. (a) Registrants. Any person who shall be registered under the provisions of section 3231 in any internal-revenue district shall, whenever required so to do by the collector of the district, render to the collector a true and correct statement or return, verified by affidavits, setting forth the quantity of marihuana received or harvested by him during such period immediately preceding the demand of the collector, not exceeding three months, as the said collector may fix and determine. If such person is not solely a producer, he shall set forth in such statement or return the names of the persons from whom said marihuana was received, the quantity in each instance received from such persons, and the date when received.

Conclusion.

In conclusion, respondent respectfully submits that none of the evidence offered and admitted by the trial court for the prosecution was obtained in violation of the Fourth and Fifth Amendments of the Constitution of the United States, or any other law; that all evidence had been originally secured by the State officers who neither acted as, nor in conjunction with, the Federal Narcotic Agents. We further urge that the arrest of the defendant was legal and accomplished in accordance with the laws of the United States and the State of California.

The evidence discloses that the statements of the defendant containing admissions were free and voluntary and that they were properly admitted against the defendant.

As to the verdict, although we confess error to the Second Count, we submit with equal force that the evidence was more than sufficient to support the conviction of the defendant upon Count One and that the conviction on said count should stand.

For the reasons set forth we pray that judgment on Count One be sustained.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney,
NORMAN W. NEUKOM,
Assistant U. S. Attorney,
CAMERON L. LILLIE,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 11868
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THELMA TIPTON, MARY FOSTER, EVA C.
WHITNEY, MARY F. DeBENEDETTI, CLARA
OWENS TURNER, TRINIDAD MORA DOR-
OTHY MORA, DORA GRAJEDA, CONCHITA
GRAJEDA, MARY S. TIBBETTS and GUSSIE
BOURNE,

Appellants,

vs.

BEARL SPROTT COMPANY, INC., a corporation,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

APR 27 1948

PAUL P. O'BRIEN,
CLERK

No. 11868
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THELMA TIPTON, MARY FOSTER, EVA C.
WHITNEY, MARY F. DeBENEDETTI, CLARA
OWENS TURNER, TRINIDAD MORA DOR-
OTHY MORA, DORA GRAJEDA, CONCHITA
GRAJEDA, MARY S. TIBBETTS and GUSSIE
BOURNE,

Appellants,

vs.

BEARL SPROTT COMPANY, INC., a corporation,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Page

Appeal:

Notice of	11
Statement of Points on, Appellants' (Circuit Court)	13
Certificate of Clerk.....	11
Complaint, Third Amended.....	2
Motion to Dismiss Third Amended Complaint.....	8
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	11
Order and Judgment Dismissing Plaintiffs' Complaint	9
Statement of Points on Appeal, Appellants' (Circuit Court)	13

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

GALLAGHER, MARGOLIS, McTERNAN & TYRE

111 West Seventh Street

Los Angeles 14, Calif.

For Appellee:

JOHN MOORE ROBINSON

ROBERT M. HIMROD

650 South Spring Street

Los Angeles 14, Calif. [1*]

In the District Court of the United States for the
Southern District of California
Central Division
No. 6343-Y

THELMA TIPTON, et al.,

Plaintiffs,

vs.

BEARL SPROTT COMPANY, INC., a corporation,
BEARL SPROTT, individually and d/b/a BEARL
SPROTT, DOE I, DOE II, DOE III,

Defendants.

THIRD AMENDED COMPLAINT

Come now the plaintiffs, and each of them, and complain against the defendants, and each of them, and allege as follows:

I.

Plaintiffs are all residents of and citizens of the County of Los Angeles, State of California.

II.

Plaintiffs are informed and believe and therefore allege that defendant Bearl Sprott Company, Inc., a corporation, is authorized to and is doing business under the laws of the State of California, with its principal place of business in the City of Torrance, County of Los Angeles, State of California. Said defendant owns, maintains and operates an in-plant cafeteria in Torrance, California, for in-plant feeding of employees of the Columbia Steel Company at Torrance, which said company is engaged in the manufacture and distribution of steel products. [24]

Plaintiffs and each of them are employees of said defendant at said plant in Torrance, California.

III.

At all times mentioned herein, prior to January 1, 1946, plaintiffs are informed and believe, and therefore allege, that defendant Bearl Sprott, individually owned, operated and maintained said cafeteria for in-plant feeding at the Columbia Steel Company plant in Torrance, California; that Bearl Sprott Company, Inc., a corporation, is the successor to Bearl Sprott and has assumed all the assets and liabilities of said Bearl Sprott.

IV.

The jurisdiction of this Court arises under 28 U. S. C., Section 41(a), giving this Court jurisdiction "of all suits and proceedings arising under any law regulating commerce," and under Section 16(b) of the Fair Labor Standards Act, 29 U. S. C., Section 216(b).

V.

That at all times herein mentioned the defendants were and now are engaged in in-plant feeding of employees and business visitors at the Columbia Steel Company plant in Torrance, California. That the Columbia Steel Company plant in Torrance, California, is and was at all times herein mentioned engaged in the manufacture, sale and distribution of steel products. That the greater portion of the products produced at said plant are produced in interstate commerce and are shipped and delivered in interstate commerce to purchasers in other states.

VI.

Plaintiffs are informed and believed and on the basis of such information and belief allege:

1. That at all such times said cafeteria was and is operated by defendants twenty-four hours per day pursuant to rules established for such cafeteria [25] by said Columbia Steel Company for the benefit of the employees of said company at said Torrance plant;
2. That said company at all such times owned the building housing the cafeteria and the greater part of the furniture, utensils, kitchen equipment and tableware utilized therein;
3. That said Company at all such times regulated the hours of operation of said cafeteria, the prices charged for foods served therein and the menus offered, to accommodate the needs and working schedules of said company's employees at said plant;
4. That said Company at all such times charged for and received from defendants 5% of the gross receipts from the operation of said cafeteria;
5. That said cafeteria was and is patronized by substantially all the employees of said company at said plant.

VII.

That plaintiffs, and each of them, are and at all times mentioned were employed by defendants in said cafeteria; that said cafeteria was and is open only to employees and business visitors of said Columbia Steel Company at said Torrance plant and not to the general public; that by virtue of the circumstances hereinabove alleged the processes and services performed by plaintiffs, and each of

them, in such employment were and are necessary to the production, handling and distribution of steel products for interstate commerce by and from said plant.

VIII.

The plaintiffs and their classifications of employment with said defendants are listed as follows:

Thelma Tipton	Steam Table
Mary Foster	Cashier [26]
Eva C. Whitney	Pastry Cook
Mary F. DeBenedetti	Cook
Clara Owens Turner	Fry Cook, Steam Table and Cashier
Trinidad Mora	Canteen Worker, Dish- washer, Salad Girl
Dorothy Mora	Dishwasher
Dora Grajeda	Dishwasher
Conchita Grajeda	Dishwasher
Mary S. Tibbitts	Cook
Gussie Bourne	Bookkeeper, Cashier, Waitress

IX.

On and after October 24, 1940, continuously until the present time, the defendants employed the plaintiffs in this action in interstate commerce and in the production of goods for interstate commerce, as aforesaid, for work weeks longer than 40 hours, and did fail and refuse to compensate said employees for their employment in excess of 40 hours for such work weeks at rates not less than 1½ times the regular rates at which said employees were employed, and said defendants failed and refused to pay to said employees any compensation for hours worked in excess of 40 during each of said work weeks.

X.

Said failure and refusal by said defendants to pay said employees for their employment in excess of 40 hours in each of said work weeks at all, or at rates not less than 1½ times the regular rates at which said employees were employed, was in violation of the Fair Labor Standards Act and Sections 7(a1), 7(a2) and 7(a3) thereof.

Plaintiffs are not informed at the present time as to the exact rate at which they were employed at all of the times mentioned herein, as to the amount of overtime rendered by each of them, or the wages still due and owing them for overtime hours worked for which no payment was made, in violation of the Fair [27] Labor Standards Act. The records of said overtime and hours worked are, or should be under the provisions of the Act, available to and in the exclusive possession of the Defendants herein. Plaintiffs request the Court to order that Defendants make an accounting of said sums due to the employees who are Plaintiffs in this action for overtime wages.

XI.

Plaintiffs are not now informed as to the true names or designations of the Defendants sued herein as Doe I, Doe II and Doe III and whether they are individual, corporate or otherwise. Plaintiffs will ask leave of Court to amend this Complaint and all pleadings herein to insert said true names and designations whether individual, corporate or otherwise, in lieu of said fictitious names, when the same shall have been ascertained.

Wherefore, Plaintiffs pray judgment against defendants, and each of them, as follows:

1. That Plaintiffs, and each of them, are entitled to recover from Defendants.
2. That the Court order an accounting to disclose the amount due to the Plaintiffs, and each of them, for overtime pay.
3. That the Court determine the amount due to each of the Plaintiffs for overtime pay, and enter judgment against Defendants herein for the respective amounts so determined.
4. That an additional equal amount be added as liquidated damages against the Defendants.
5. That Plaintiffs be awarded court costs and reasonable attorneys' fees for Plaintiffs' counsel. [28]
6. For such other and further relief as to this Court may seem just and proper in the premises.

GALLAGHER, MARGOLIS, McTERNAN & TYRE

By John W. Porter

Attorneys for Plaintiffs [29]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 11, 1947. Edmund L. Smith, Clerk. [30]

[Title of District Court and Cause]

MOTION TO DISMISS

Comes now defendant Bearl Sprott Company, Inc., a corporation, and moves the Court as follows:

To dismiss the action because the *Second* Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

The above motion is based on the following grounds:

1. That this defendant is not and has not been at any time in interstate commerce, or engaged in the production of goods for interstate commerce.

2. That this defendant is and was, and at all times mentioned in plaintiff's First Amended Complaint was, engaged in a retail or service established, the greater part of whose retailing or servicing is and was in intrastate commerce within the meaning [31] of Section 13(a) 2 of the Fair Labor Standards Act of 1938, 29 USCA Section 213(a) 2, and in fact the whole of the selling or servicing of this defendant was in intrastate commerce.

Dated December 29, 1947.

JOHN MOORE ROBINSON and
ROBERT M. HIMROD

By John Moore Robinson

Attorneys for Defendant Bearl Sprott
Company, Inc. [32]

[Endorsed]: Filed Dec. 30, 1947. Edmund L. Smith,
Clerk.

In the District Court of the United States for the
Southern District of California
Central Division

No. 6343-Y

THELMA TIPTON, MARY FOSTER, EVA C.
WHITNEY, MARY F. DE BENEDETTI, CLARA
OWENS TURNER, TRINIDAD MORA, DOR-
OTHY MORA, DORA GRAJEDA, CONCHITA
GRAJEDA, MARY S. TIBBETTS and GUSSIE
BOURNE,

Plaintiffs,

vs.

BEARL SPROTT COMPANY, INC., a corporation,
DOE I, DOE II, DOE III,

Defendants.

ORDER AND JUDGMENT DISMISSING
PLAINTIFFS' COMPLAINT

On the 12th day of January, 1948, at 10:00 o'clock A. M., the motion of the defendant, Bearl Sprott Company, Inc., in the above entitled action, to dismiss plaintiffs' Third Amended Complaint because said Third Amended Complaint failed to state a claim against said defendant upon which relief could be granted, came on to be heard before the Honorable Leon R. Yankwich, Judge of the above entitled Court, in court room No. 5, Federal Building, City of Los Angeles, State of California; the motion was argued by counsel, and thereupon upon consideration thereof, it was ordered, adjudged and decreed that said motion be sustained without leave to amend, and that plaintiffs' action be dismissed on the ground that plaintiffs' Third Amended Complaint failed

to state a claim against defendant Bearl Sprott Company, Inc. upon which relief could [39] be granted, in that defendant Bearl Sprott Company, Inc. was not and had not been at any time engaged in interstate commerce, or engaged in the production of goods for interstate commerce, and, therefore, was not affected by any of the requirements of the provisions of the Fair Labor Standards Act of 1938, Section 7(a), 29 U. S. C. A., Section 207(a); that plaintiffs, employees of Bearl Sprott Company, Inc., were not engaged in any process or occupation necessary to the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938, Section 3(j), 29 U. S. C. A., Section 203(j); that said defendant recover its costs incurred and that plaintiffs be adjudged to pay all costs incurred in this action, for which let execution issue.

Dated: January 23, 1948.

LEON R. YANKWICH

District Judge

The within Order and Judgment Dismissing Plaintiffs' Complaint is approved as to form. Dated: January 21, 1948. Gallagher, Margolis, McTernan & Tyre, by John W. Porter, Attorneys for Plaintiffs.

Judgment entered Jan. 23, 1948. Docketed Jan. 23, 1948. C. O. Book 48, page 79. Edmund L. Smith, Clerk; by John A. Childress, Deputy. [40]

Received copy of the within Order and Judgment this 21 day of January, 1948. John W. Porter, Attorney.

[Endorsed]: Filed Jan. 23, 1948. Edmund L. Smith, Clerk. [41]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiffs above named, and each of them, hereby appeal to the Circuit Court of Appeals for the 9th Circuit, from the judgment of dismissal entered in this action on January 23, 1948, in Civil Order Book No. 48, page 79.

Dated: January 29, 1948.

GALLAGHER, MARGOLIS, McTERNAN & TYRE

By John W. Porter

Attorneys for Plaintiffs [42]

[Affidavit of Service by Mail.]

[Endorsed]: Filed & mld. copy to Robinson & Himrod, Attys. for Defts., Jan. 30, 1948. Edmund L. Smith, Clerk. [43]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 48, inclusive, contain full, true and correct copies of Complaint; Second Amended Complaint; Motion to Dismiss; Memorandum of Points and Authorities; Memorandum of Points and Authorities in Opposition to Motion to Dismiss Second Amended Complaint; Third Amended Complaint; Motion to Dismiss; Memorandum of Points and Authorities; Memorandum of Points and Authorities in Opposition to Motion to Dismiss Third Amended

Complaint; Minute Order Entered January 12, 1948; Order and Judgment Dismissing Plaintiffs' Complaint; Notice of Appeal; Notice Designating Papers and Records to Be Incorporated in the Record on Appeal and Appellee's Designation of Additional Portions of Records and Proceedings to be contained in the Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$12.60 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 24 day of February, A. D. 1948.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,

Chief Deputy Clerk.

[Endorsed]: No. 11868. United States Circuit Court of Appeals for the Ninth Circuit. Thelma Tipton, Mary Foster, Eva C. Whitney, Mary F. DeBenedetti, Clara Owens Turner, Trinidad Mora, Dorothy Mora, Dora Grajeda, Conchita Grajeda, Mary S. Tibbetts and Gussie Bourne, Appellants, vs. Bearl Sprott Company, Inc., a corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed February 25, 1948.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
in and for the Ninth Circuit

No. 11868

THELMA TIPTON, et al.,

Appellants,

vs.

BEARL SPROTT CO., INC.,

Appellee.

APPELLANTS' STATEMENT OF POINTS ON
APPEAL

Appellants hereby state, in accordance with Subdivision 6, Rule 19, of the Rules of this Court, that upon their appeal herein, they intend to rely upon the following points:

I.

The facts alleged in the Third Amended Complaint herein, admitted for purposes of the defendant's motion to dismiss, show that plaintiffs, employed in preparing and serving food in an in-plant industrial cafeteria to workers engaged in the production of steel products for commerce, were and are themselves employed in occupations necessary to the production and distribution of goods for commerce within the meaning of Sec. 3 of the Fair Labor Standards Act. (29 U. S. C. A., Sec. 203.)

II.

The facts alleged in the Third Amended Complaint herein show that plaintiffs were and are not engaged in any retail or service establishment the greater part of whose selling or servicing is or was in interstate com-

merce within the meaning of Sec. 13(a) (2) of the Fair Labor Standards Act.

III.

The Third Amended Complaint states, on behalf of each of the plaintiffs a claim upon which relief may be granted under Sec. 16(b) of said Act. (29 U. S. C. A., Sec. 216(b)).

Appellants hereby designate the following portions of the record herein as necessary to the consideration of the foregoing points:

* * * * *

Dated: March 2, 1948.

GALLAGHER, MARGOLIS, McTERNAN & TYRE

By John W. Porter

Attorneys for Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 6, 1948. Paul P. O'Brien,
Clerk.

No. 11868
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THELMA TIPTON, MARY FOSTER, EVA C. WHITNEY,
MARY F. DE BENEDETTI, CLARA OWENS TURNER,
TRINIDAD MORA, DOROTHY MORA, DORA GRAJEDA,
CONCHITA GRAJEDA, MARY TIBBITTS and GUSSIE
BOURNE,

Appellants,

vs.

BEARL SPROTT COMPANY, INC., a corporation, BEARL
SPROTT, individually and d/b/a BEARL SPROTT, DOE
I, DOE II, DOE III,

Respondents.

BRIEF FOR APPELLANTS.

GALLAGHER, MARGOLIS, McTERNAN & TYRE,
728, One Eleven West Seventh Street Building,
Los Angeles 14,

Attorneys for Appellants.



MAY 23 1941

PAUL R. O'BRIEN

TOPICAL INDEX

	PAGE
Jurisdiction	1
Preliminary statement	1
Summary of argument.....	3
Argument	4

I.

The third amended complaint pleads facts sufficient to establish the jurisdiction of the District Court.....	4
A. Appellants are alleged to be engaged in occupations necessary to the production of goods for commerce....	4
B. The appellants are not engaged in a retail or service establishment	7
Conclusion	8

TABLE OF AUTHORITIES CITED

CASES	PAGE
A. B. Kirschbaum Co. v. Walling, 316 U. S. 517, 86 L. Ed. 1638	5
A. H. Phillips, Inc. v. Walling, 324 U. S. 490, 89 L. Ed. 1095....	8
Armour & Co. v. Wantock, 326 U. S. 126, 89 L. Ed. 118.....4, 5,	7
Basik v. General Motors Corporation, 19 N. W. (2d) 142.....6,	7
Consolidated Timber Co. v. Womack, 132 F. (2d) 101.....6,	8
Ferguson v. Prophet Co. (D. Ind., 1946), Home Cases 284.....	6
Hanson v. Lagerstrom, 133 F. (2d) 120.....	6
McCleod v. Trelkeld, 319 U. S. 491, 87 L. Ed. 1538.....	6
Walling v. Armstrong, 68 Fed. Supp. 870; aff'd 161 F. 515.....	7
Walton v. Southern Package Corporation, 320 U. S. 540, 88 L. Ed. 298.....	4, 5

STATUTES

Fair Labor Standards Act, Sec. 3(j).....	2, 4
Fair Labor Standards Act, Sec. 7.....	3
Fair Labor Standards Act, Sec. 13(a) (2).....	3, 7
Fair Labor Standards Act, Sec. 16(b) (29 U. S. C., Sec. 216(b))	1, 3
Judicial Code, Sec. 128 (28 U. S. C., Sec. 225).....	1

No. 11868
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THELMA TIPTON, MARY FOSTER, EVA C. WHITNEY,
MARY F. DE BENEDETTI, CLARA OWENS TURNER,
TRINIDAD MORA, DOROTHY MORA, DORA GRAJEDA,
CONCHITA GRAJEDA, MARY TIBBITTS and GUSSIE
BOURNE,

Appellants,

vs.

BEARL SPROTT COMPANY, INC., a corporation, BEARL
SPROTT, individually and d/b/a BEARL SPROTT, DOE
I, DOE II, DOE III,

Respondents.

BRIEF FOR APPELLANTS.

Jurisdiction.

This is an appeal from an order and judgment of the District Court of the United States for the Southern District of California, Central Division, dismissing the third amended complaint of appellants, plaintiffs below, without leave to amend. The jurisdiction of this Court arises under Section 128 of the Judicial Code, as amended (Title 28 U. S. C., Sec. 225).

Preliminary Statement.

The action is one for overtime wages brought by appellants against their corporate employer under the provisions of Section 16(b) of the Fair Labor Standards Act (29 U. S. C. Section 216(b)). Originally filed on January 24, 1947, the complaint was amended from time to time

with appropriate leave. The present appeal is from the order and judgment of the District Court granting respondents' motion to dismiss the third amended complaint upon the ground that the appellants' employer, the principal respondent here, was not engaged in interstate commerce within the meaning of the Fair Labor Standards Act, and that appellants, under the allegations of the third amended complaint, were not engaged in any process or occupation necessary to the production of goods for interstate commerce within the meaning of Section 3(j) of that Act [Record pp. 9-10].

Upon this record the sole issue is whether the facts pleaded in the third amended complaint are sufficient to establish the jurisdiction of the trial court under the Fair Labor Standards Act.

Briefly, the complaint alleges that the respondent corporation owns and operates a cafeteria in the plant of the Columbia Steel Company at Torrance, California, where the latter is engaged in the manufacture and distribution of steel products in interstate commerce [R. pp. 2, 3]. It is alleged that the appellants were employees of the respondents during the period referred to in the complaint and were employed in various capacities in connection with the operation of respondents' cafeteria [R. pp. 3, 5]. The cafeteria, it is alleged, is operated twenty-four (24) hours per day under rules established by the steel company for the benefit of that company's employees. The steel company owns the building in which the cafeteria is housed and the greater part of the furnishings, utensils and equipment used by the respondents. It further regulates the cafeteria's hours of operation, menus and the prices charged for the food which it serves in order to meet the work schedules and convenience of the steel company's

employees, substantially all of whom patronize the cafeteria [R. p. 4]. In consideration of the right to maintain the cafeteria, respondents pay to the steel company five (5%) per cent of gross receipts from the operation. The cafeteria is open only to employees and business visitors of the steel company [R. pp. 4, 5].

The gravamen of the complaint is that during the period specified the respondents employed the appellants for work weeks of more than 40 hours and at all times failed and refused to compensate them for work in excess of 40 hours at $1\frac{1}{2}$ times the regular rates at which appellants were employed, in violation of Section 7 of the Fair Labor Standards Act [R. p. 5]. Upon this showing the complaint seeks an accounting to determine the precise amounts due to each of the appellants and judgment in their favor in such amounts, together with liquidated damages, court costs and attorneys fees [R. p. 7].

Upon the respondents' motion to dismiss all these allegations of the third amended complaint must be taken as admitted.

Summary of Argument.

Appellants contend that the order and judgment of the District Court were in error and that the third amended complaint pleads facts sufficient to establish the jurisdiction of the Court under Section 16(b) of the Fair Labor Standards Act. The facts pleaded, it is submitted, show that appellants are engaged in occupations necessary to the production of steel products for interstate commerce. They negative, further, respondents' contention that appellants are engaged in a retail or service establishment the greater part of whose activities are in intrastate commerce within the meaning of Section 13(a)(2) of the Fair Labor Standards Act.

ARGUMENT.

I.

The Third Amended Complaint Pleads Facts Sufficient to Establish the Jurisdiction of the District Court.

A. APPELLANTS ARE ALLEGED TO BE ENGAGED IN OCCUPATIONS NECESSARY TO THE PRODUCTION OF GOODS FOR COMMERCE.

The decision of the United States Supreme Court in *Armour & Co. v. Wantock*, 326 U. S. 126, 89 L. Ed. 118 (1944), authoritatively clarified the meaning of Section 3(j) of the Fair Labor Standards Act, which draws the protection of that remedial statute over processes and occupations necessary to the production of goods for interstate commerce. In that case the court held that private auxiliary firemen employed primarily for the purpose of reducing the employer's fire insurance premiums were engaged in such occupations within the meaning of the Act. Giving to the statute the liberal construction required to effectuate its social objectives, the court rejected the narrow view that the process or occupation must be indispensable to the productive process. On the contrary, it is "necessary" within the Act if it contributes to the economy or continuity of production.

The same view sustained the jurisdiction of the federal courts in *Walton v. Southern Package Corporation*, 320 U. S. 540, 88 L. Ed. 298 (1944). There the services of the night watchman, employed both for plant protection and to reduce fire insurance premium rates, were held to be necessary since, as the Court stated, they constituted "a valuable contribution to the continuous production of respondents' goods."

These are the principles by which the pleading in the case at bar must be tested. Putting aside the fact that appellants were serving an employer other than the employer engaged in production for commerce, it is necessary only to determine whether their services make a “valuable contribution” to the production of steel at the plant in question. That they do so is manifest from the facts that the cafeteria is utilized by substantially all the production workers at the plant, that it is open to these workers twenty-four hours a day, that it is operated in such a way as to meet their needs as employees of the steel company and for their benefit rather than for the convenience of the public at large. Indeed, the mere circumstance that the steel company deems the operation of the cafeteria of sufficient importance to make space and equipment available and to exercise general supervision of it might, without more, be regarded as conclusive of the value attached to the services of the appellants by the producer himself.

Together, these considerations evidence participation by the appellants in the maintenance of continuous and efficient production to a degree and on a level considerably higher than that of the employees involved in the *Armour* and *Walton* cases. This Court may, if need be, notice judicially that the provision of adequate and convenient eating facilities contributes directly to the productivity of industrial workers, and far more substantially than does the employment of auxiliary firemen, watchmen or window cleaners.

Cf. *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517, 86 L. Ed. 1638 (1942).

It is of no importance that the in-plant cafeteria where the appellants are employed is not alleged to be the only

or even the principal eating facility in the vicinity of the plant.

Basik v. General Motors Corporation, 19 N. W. (2d) 142 (Mich., 1945);

Ferguson v. Prophet Co. (D. Ind., 1946), Home Cases 284.

As the cafeteria provides a valuable service, it makes no difference that comparable facilities exist elsewhere. The presence or absence of other eating facilities is merely one element to be considered in determining whether or not the services of employees furnishing the food are necessary.

Consolidated Timber Co. v. Womack, 132 F. (2d) 101 (C. C. A. 9, 1942);

Hanson v. Lagerstrom, 133 F. (2d) 120 (C. C. A. 8, 1943).

Appellants' employment by an independent contractor rather than by the producer who is himself engaged in commerce cannot affect the jurisdiction of the District Court. From the first, courts have recognized that whether employees are entitled to the benefits of the Fair Labor Standards Act depends not upon the business of their employer, but upon the relationship of their activities to the productive process. And the test of whether or not an occupation is "necessary" to the production of goods for commerce is substantially less exacting than the test of whether the employee or his employer is engaged "in commerce."

McCleod v. Threlkeld, 319 U. S. 491, 87 L. Ed. 1538 (1943).

Even if this were not the case, the facts pleaded here describe a relationship between the employer and the producer for commerce so integrated as to eliminate this question. Since the steel company has a vital stake in the operation of the cafeteria through its interest in the gross receipts, its ownership of the building and facilities and its supervision of the operation, it is immaterial that the appellants are not on its payroll.

Basik v. Gen. Motors Corp., supra.

The test is a practical one (*Armour & Co. v. Wantock, supra*). And by that test the appellants clearly can and do make a valuable contribution to the production of steel at the plant in question.

B. THE APPELLANTS ARE NOT ENGAGED IN A RETAIL OR SERVICE ESTABLISHMENT.

While the District Court did not expressly pass upon the point the respondents have contended and no doubt will continue to contend that the appellants' employment is in a retail or service establishment and exempt under Section 13(a)(2) of the Fair Labor Standards Act.

This contention is sufficiently answered by the allegations of the third amended complaint that the cafeteria where appellants are employed is open only to employees and business visitors of the steel company. As such it is plainly not a retail establishment open to and maintained for the patronage of the general public as contemplated by the exemption. (*Walling v. Armstrong* (D. Mass., 1946), 68 F. Supp. 870; *affd.* (C. C. A. 1), 161 F. (2d) 515.)

Moreover, this exemption is to be narrowly construed and the burden rests upon the respondents to plead and prove facts showing that it is applicable.

A. H. Phillips, Inc. v. Walling, 324 U. S. 490, 89 L. Ed. 1095 (1945);

Consolidated Timber Co. v. Womack, *supra*.

Conclusion.

It follows that the third amended complaint alleges facts sufficient to establish the jurisdiction of the District Court, and to that extent, states on behalf of each of the appellants a claim upon which relief may be granted under the applicable statute.

Respectfully submitted,

GALLAGHER, MARGOLIS, McTERNAN & TYRE,

By JOHN W. PORTER,

Attorneys for Appellants.

No. 11868

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THELMA TIPTON, MARY FOSTER, EVA C. WHITNEY,
MARY F. DE BENEDETTI, CLARA OWENS TURNER,
TRINIDAD MORA, DOROTHY MORA, DORA GRAJEDA,
CONCHITA GRAJEDA, MARY TIBBITTS and GUSSIE
BOURNE,

Appellants,

vs.

BEARL SPROTT COMPANY, INC., a corporation, BEARL
SPROTT, individually and d/b/a BEARL SPROTT, DOE I,
DOE II, DOE III,

Respondents.

BRIEF FOR RESPONDENTS.

FILED

JUN 11 1948

JOHN MOORE ROBINSON,

ROBERT M. HIMROD,

PAUL P. O'BRIEN,

CLERK

917 Bank of America Building, Los Angeles 14,
Attorneys for Respondent Bearl Sprott Company, Inc.

TOPICAL INDEX

	PAGE
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement of the case.....	3
Statement of points to be urged.....	4
Argument	5
Summary of argument.....	5
Point I. Plaintiffs' third amended complaint fails to establish that plaintiff employees were engaged in the production of goods for commerce.....	6
A. The activities of plaintiffs are merely a comfort and convenience at best and are not necessary to the production of goods for commerce or connected in any way therewith	6
B. Plaintiffs are ministering to the personal needs of the steelworkers and are not engaged in the production of steel and steel products.....	11
Point II. Plaintiffs are engaged in a retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce	14
Conclusion	15

TABLE OF AUTHORITIES CITED

CASES	PAGE
A. B. Kirschbaum Co. v. Walling, 316 U. S. 517, 86 L. Ed. 1638	7, 12
Armour & Co. v. Wantock, 323 U. S. 126, 89 L. Ed. 118, 19 N. W. (2d) 145.....	10, 12
Basik v. General Motors Corporation, 311 Mich. 705, 19 N. W. (2d) 142, 5 W. H. Cases 408.....	10
Consolidated Timber Co. v. Womack, 132 F. (2d) 101, 2 W. H. Cases 211.....	8, 11, 12, 14
Ferguson v. Prophet Co., 6 W. H. Cases 284.....	9
Hanson v. Lagerstrom, 133 F. (2d) 120.....	11
Harlan-Wallins Coal Corporation v. David, 303 Ky. 84, 196 S. W. (2d) 881.....	13
Kuhn v. Canteen Food Service, Inc., 4 W. H. Cases 913.....	8, 11
McLeod v. Threlkeld, 319 U. S. 491, 87 L. Ed. 1538.....	7
Relander v. Mason County Logging Co., 2 W. H. Cases 1052....	12
Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. Ed. 984....	14
Walton v. Southern Package Corporation, 320 U. S. 540, 88 L. Ed. 298.....	12
Wilson v. R. F. C., 158 F. (2d) 564.....	13

STATUTES

Fair Labor Standards Act of 1938, Sec. 3(j) (29 U. S. C., Sec. 203(j))	2, 3, 6
Fair Labor Standards Act of 1938, Sec. 7(a) (29 U. S. C., Sec. 207(a))	2, 3, 6
Fair Labor Standards Act of 1938, Sec. 13(a) (29 U. S. C., Sec. 213(a))	3, 15
Fair Labor Standards Act of 1938, Sec. 16(b) (29 U. S. C., Sec. 216(b))	1
Fair Labor Standards Act of 1938 (29 U. S. C., Secs. 201-219)	2, 11, 13
Judicial Code, Sec. 24(8) (28 U. S. C., Sec. 41(8)).....	1
Judicial Code, Sec. 128 (28 U. S. C., Sec. 225).....	1

No. 11868

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THELMA TIPTON, MARY FOSTER, EVA C. WHITNEY,
MARY F. DE BENEDETTI, CLARA OWENS TURNER,
TRINIDAD MORA, DOROTHY MORA, DORA GRAJEDA,
CONCHITA GRAJEDA, MARY TIBBITTS and GUSSIE
BOURNE,

Appellants,

vs.

BEARL SPROTT COMPANY, INC., a corporation, BEARL
SPROTT, individually and d/b/a BEARL SPROTT, DOE I,
DOE II, DOE III,

Respondents.

BRIEF FOR RESPONDENTS.

Jurisdiction.

Appellants have appealed from an order and judgment of the District Court of the United States for the Southern District of California, Central Division, dismissing appellants' third amended complaint without leave to amend. Appellants had attempted to invoke the jurisdiction of the District Court of the United States under Section 24(8) of the Judicial Code (28 U. S. C. Sec. 41(8)) and Section 16(b) of the Fair Labor Standards Act of 1938 (29 U. S. C., Sec. 216(b)). The jurisdiction of this Court on appeal arises under Section 128 of the Judicial Code, as amended (28 U. S. C., Sec. 225).

Question Presented.

Whether or not a feeding establishment located within a manufacturing plant and operated by an outside agency engaged in the business of carrying on in-plant feeding is within the provisions of the Fair Labor Standards Act of 1938 (29 U. S. C., Sections 201-219, inclusive) and is required to pay compensation at the rate of time and one-half for hours in excess of forty hours per week.

Statutes Involved.

Fair Labor Standards Act of 1938, Section 3(j) (29 U. S. C., Section 203(j)) provides:

“ ‘Produced’ means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.”

Fair Labor Standards Act of 1938, Section 7(a) (29 U. S. C., Section 207(a)) provides:

“No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce.

“(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

“(2) for a workweek longer than forty-two hours during the second year from such date, or

“(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”

Fair Labor Standards Act of 1938, Section 13(a) (29 U. S. C., Section 213(a)) provides:

“The provisions of 6 and 7 shall not apply with respect to * * * (2) An employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce.”

Statement of the Case.

This is an appeal from the order and judgment of the District Court of the United States for the Southern District of California, Central Division, granting respondent's motion to dismiss plaintiffs' third amended complaint without leave to amend upon the ground that plaintiffs were not engaged in commerce or the production of goods for commerce within the meaning of Section 7(a) of the Fair Labor Standards Act of 1938 (29 U. S. C., Sec. 207 (a)); that plaintiffs were not engaged in any process or occupation necessary to the production of goods for interstate commerce within the meaning of Section 3(j) of the Fair Labor Standards Act of 1938 (29 U. S. C., Sec. 203(j)).

Plaintiffs, or some of them, were employed by Bearl Sprott Company, Inc., commencing January 1, 1946 [Record pp. 2-3]. For purposes of defendants' motion to dismiss, the facts well pleaded in plaintiffs' complaint [Record pp. 2-7] had to be taken as admitted and it follows that on this appeal such complaint must be considered as a true statement of facts herein.

For purposes of simplification, the defendant Bearl Sprott Company, Inc., which employed plaintiffs or some of them on and after January 1, 1946, will herein be referred to as defendant.

Statement of Points to Be Urged.

1. Plaintiffs were not engaged in any process or occupation necessary to the production of goods for interstate commerce but were engaged in an occupation catering to the personal needs of the steelworkers and not in any sense connected with the production of steel, steel products or any goods for interstate commerce.

2. Plaintiffs' employer was carrying on a retail or service establishment, the greater part of whose selling or servicing was in intrastate commerce.

ARGUMENT.

Summary of Argument.

Here involved is a situation where plaintiffs are engaged in catering to the personal needs of the employees of the Columbia Steel Company. No showing has been made by appellants that this activity is in any fashion a process or occupation necessary to the production of goods for interstate commerce. The purview of the Fair Labor Standards Act of 1938 has only been extended beyond activities directly connected with the production of goods or the maintenance of plants and equipment in a few exceptional cases. These, in industrial feeding situations, are cases of inaccessability where the plant would have to shut down without such service or where the employer is engaged himself in the production of the goods for interstate commerce and the activities of the strictly food purveying employees are intermingled with the activities of covered employees. There the employer is using all of his employees as instrumentalities to achieve the desired end—the production of goods for interstate commerce. Respondents further contend that appellants' activities are also exempt in that they are engaged in a retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce.

POINT I.

Plaintiffs' Third Amended Complaint Fails to Establish That Plaintiff Employees Were Engaged in the Production of Goods for Commerce.

A. The Activities of Plaintiffs Are Merely a Comfort and Convenience at Best and Are Not Necessary to the Production of Goods for Commerce or Connected in Any Way Therewith.

Defendant is engaged in the restaurant and feeding business, and among other activities, carried on the one involved herein, that of operating an industrial feeding establishment and cafeteria in the plant of the Columbia Steel Company in the city of Torrance, California. The Columbia Steel Company is admittedly engaged in the manufacture and distribution of steel and steel products and as such is engaged in the production of goods for interstate commerce. Plaintiffs and each of them were employees of defendant rather than of Columbia Steel Company.

We are here faced with the problem of the interpretation of the phrase "engaged in the production of goods for commerce" as found in Section 7(a) of the Fair Labor Standards Act of 1938. There is no contention on the part of appellants that they or any of them are "engaged in commerce." By Section 3(j) of the Act (Fair Labor Standards Act of 1938 (29 U. S. C., Section 203(j))), "engaged in the production of goods" is defined, in so far as relevant here, as the situation where the employee is employed in any process or occupation necessary to the production of such goods.

By the familiar process of judicial inclusion and exclusion the limits of necessity have been rather well defined, but as was said in *A. B. Kirschbaum Co. v. Walling* (1942), 316 U. S. 517, 520, 86 L. Ed. 1638,

“The search for a dependable touchstone by which to determine whether employees are engaged in commerce or in the production of goods for commerce is as rewarding as an attempt to square the circle.”

Therefore, though cases involving activities other than industrial feeding may be suggestive, it is necessary to more closely examine the industrial feeding cases in point. The case of *McLeod v. Threlkeld* (1943), 319 U. S. 491, 87 L. Ed. 1538, is the latest expression of the United States Supreme Court on the subject of the applicability of the Act to employees of an industrial feeding contractor. There meals were furnished to employees of a railroad engaged in interstate commerce. A cook who worked in a cook car which was moved from place to place following a railroad construction gang, was held not to be engaged in interstate commerce. The activity of the employee was the important thing, the Court saying, page 497:

“It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.”

The Court went on to note that the Legislative history of the Fair Labor Standards Act of 1938 showed that Congress had rejected the idea of having the Act apply to those engaged in commerce or in any industry affecting commerce, but decided to limit the application of the Act to employees in commerce or engaged in the production of goods for commerce.

A well reasoned case, in which the factual situation was precisely similar to the facts of the within action, is the case of *Kuhn v. Canteen Food Service, Inc.* (D. C. Ill. 1944), 4 W. H. Cases 913. There as here the feeding was done by an outside industrial feeding contractor, there as here no showing was made by plaintiffs of the inaccessibility of the plant to other sources of meals, and there as here it was not shown that the restaurants or cafeterias were a link in the chain of production or a means whereby the manufacturing plant accomplished the purpose of its existence. The Court in distinguishing the case of *Consolidated Timber Co. v. Womack* (C. C. A. 9, 1942), 132 F. (2d) 101, 2 W. H. Cases 211 (which was one of the inaccessible lumber camp cases) and in making its decision said, page 918,

“That case is readily distinguishable from the present case inasmuch as the cafeteria or restaurant operated by defendant corporation (a) was a separate and independent establishment; (b) it was not a part of the facilities of the company which operated the plant and produced the goods; (c) it is not shown in the complaint that any restaurant was a link in the chain of production of goods; (d) it is not shown by any allegation of the complaint that the service rendered by these independent establishments of defendant corporation were a means whereby the plant

manufacturer accomplished the purpose of its existence. The Court is convinced that in cases where the production of goods is in an isolated spot where board cannot be readily obtained by employees, that it would be necessary for the company to furnish board to its employees, and in such cases the furnishing of the board would be a necessary part of the production of the goods. But where an independent contractor furnishes and makes available a service to employees of a plant and it is not shown that this service is a part of the manufacturer's business, then the service in furnishing food and refreshments is for the convenience but not necessity of the employees of the manufacturer, and service is not bound by such a close tie as makes the service thus made available to the plant employees necessary to the production of the goods."

This, it is submitted is the precise situation here. No showing was made that the activities of plaintiffs were a link in the chain of the production of goods or that defendant's establishment was a means by which the Columbia Steel Company accomplished the manufacture and distribution of steel and steel products, nor was any showing of inaccessibility made.

In *Ferguson v. Prophet Co.* (D. C. Ind. 1946), 6 W. H. Cases 284, cited by the appellants, the Court determined that such showing had been made by reason of the much more intimate connection of defendant's employees with the manufacturing plant within whose gates they were employed and because of the inaccessibility of such plant.

The employees hired there had to pass through the screening of the plant personnel department and secure its

approval. Furthermore the feeding contractor therein could draw at all times on the plant for additional help, and in fact, it would seem that its labor force at all times consisted in part of plant employees. Plaintiff there further showed that only one restaurant was closer than one mile and it could only serve 100 people. There was another restaurant about a mile away (capacity not shown) and the next one was one and one-half miles away which could serve 50 or 60 people.

In the instant case, if the plaintiffs could have alleged inaccessibility they would, it must be presumed, have done so. The Court can take judicial notice of the fact that the Columbia Steel Company plant is located within a short distance of numerous large restaurants in a populous and growing city.

Basik v. General Motors Corporation (1945), 311 Mich. 705, 19 N. W. (2d) 142 (5 W. H. Cases 408), cited by appellants, is, with the exception of the lumber camp cases, the remaining case concerning industrial feeding discovered by counsel herein. It involved a situation in direct contrast to the instant case, a situation where the manufacturing plant itself carried on the feeding of its own employees. The Court reviewed the night watchman cases and the inaccessible lumber camp cases and said, significantly, with reference to the case of *Armour & Co. v. Wantock* (1944), 323 U. S. 126, 89 Ed. 118, at page 145 of 19 N. W. (2d),

“ . . . that, although not decisive, the fact that the employer shows no ostensible purpose for being in business except to produce goods for commerce, is entitled to consideration in determining whether employees hired by him are engaged in work which is ‘necessary’ to the production of goods for commerce.”

B. Plaintiffs Are Ministering to the Personal Needs of the Steelworkers and Are Not Engaged in the Production of Steel and Steel Products.

It is submitted that cases involving firemen, watchmen, and maintenance-of-plant employees, whether such employees are employed directly by the manufacturer, or by the independent contractor, are not controlling here. Here the personal needs of the workers are ministered to; in those cases the plant or the machinery is kept in repair and enabled to turn out goods for commerce. To hold that plaintiffs are within the purview of the Fair Labor Standards Act of 1938 (29 U. S. C., Secs. 201-219) is as unwarranted an extension of the scope of the Act as it would be if in the case of an employee that brought his own lunch, an attempt was made to hold that a cook or housekeeper who prepared such lunch at the employee's home was "engaged in the production of goods for commerce."

Other cases that have dealt with the problem of catering to the personal needs of production employees are *Consolidated Timber Co. v. Womack* (C. C. A. 9, 1942), 132 F. (2d) 101, and *Hanson v. Lagerstrom* (C. C. A. 8, 1943), 133 F. (2d) 120, both cited by appellants. Both cases involved inaccessibility; in the former there was no other eating facility within 20 miles and in the latter there was only a small doughnut and coffee shop nearby which was wholly inadequate. In those cases, if meals had not been provided by the employer the operations would have entirely ceased. The case of *Kuhn v. Canteen Food Service, Inc.*, *supra*, distinguished them on this ground. Note also that the food was provided by the employer who was in each case engaged in the produc-

tion of goods for interstate commerce. The case of *Re-lander v. Mason County Logging Co.* (Wash. Superior Ct., 1942), 2 W. H. Cases 1052, involved a lumber camp that was accessible. The Court there distinguished the *Womack* case, *supra*, held the employees not covered by the Act, and pointed out that the work had continued for five months while the cookhouse was shut down.

It would seem clear from the cases, then, that the rule is that a case of real necessity must be shown, a showing that without the food service production would be shut down or seriously curtailed. Merely that it might be pleasant and convenient to have a restaurant or cafeteria in a plant is not enough, an exception to the exemption of employees of an independent contractor catering to the personal needs of workmen will only be made in cases of extreme necessity, where but for such service the plant would have to shut down or seriously curtail operations. In the instant case no showing is made that the abandonment of service by defendant would have caused a ripple in the production of Columbia Steel Company. Presumably more workers would have brought their lunches and the rest would have eaten at nearby restaurants.

The cases of *Armour & Co. v. Wantock* (1944), 326 U. S. 126, 89 L. Ed. 118; *Walton v. Southern Package Corporation* (1944), 320 U. S. 540, 88 L. Ed. 298; and *A. B. Kirschbaum Co. v. Walling* (1942), 316 U. S. 517, 86 L. Ed. 1638, all cited by counsel for appellants as authorities for their contentions herein, involved auxiliary firemen, night watchmen, and building maintenance employees and elevator operators, respectively. In each case such employees carry on activities directly related to plant maintenance or protection and contribute directly to the

maintenance of the flow of goods into commerce. None of these cases apply to our situation, where a contribution to the personal desires and convenience of the employees is alleged to render appellants subject to the Fair Labor Standards Act of 1938 (29 U. S. C., Sections 201-219).

Two further cases are instructive. The first is that of *Harlan-Wallins Coal Corporation v. David* (1946), 303 Ky. 84, 196 S. W. (2d) 881, where the caretaker of a bathhouse maintained by the company for the use of such employees as cared to take advantage of it and pay one dollar a month, was held not to be engaged in the production of goods. The nature of the work performed by the employee was the deciding factor in the decision therein. Even though bathtaking is healthy and promotes morale, it is, like the food cases, too remote from the chain of production. Another analogous case is *Wilson v. R. F. C.* (C. C. A. 5, 1946), 158 F. (2d) 564, where the Reconstruction Finance Corporation built houses for workers in the magnesium plant of an independent contractor. It was held that firemen, and operators of the water plant that served these workers' homes, were not engaged in the production of goods for commerce.

It is submitted that the services in the above cases are similar to those of the instant action where the nutritional needs of plant workers are catered to. Such services are attentions to the personal needs of the workers and must be sharply distinguished from the situation where some service is rendered which contributes in some way to the manufacturing plant and its facilities, or to one or more of the elements that go to make up the finished goods which are sent out into the stream of commerce. It must be borne in mind that activity that caters to the *personal*

convenience of the worker and activity *necessary* to the production of goods are completely different and must not be confused. A few years ago everybody brought lunches; now many desire to eat in restaurants. This shift in custom does not create a necessity to the production of steel in catering to this desire. It is the satisfaction of a personal convenience and desire, not steelmaking.

II.

Plaintiffs Are Engaged in a Retail or Service Establishment, the Greater Part of Whose Selling or Servicing Is in Intrastate Commerce.

As was pointed out in *Consolidated Timber Co. v. Womack* (C. C. A. 9, 1942), 132 F. (2d) 101, an ordinary restaurant or eating place renders a service rather than makes a sale. As such service establishment, defendant catered to the personal needs of the workers and business visitors to the plant [Rec. pp. 3-4]. Serving of meals was not restricted to the employees. The food was sold for cash to the employees or business visitors of the Columbia Steel Company [Rec. 3-4], and defendant catered to the needs and wants of such employees and business visitors viewed as a part of the general consuming public and not merely as employees. As was so aptly stated by Mr. Justice Holmes in *Terminal Taxicab Co. v. Kutz* (1916), 241 U. S. 252, 60 L. Ed. 984:

“The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389. The public does not mean everybody all the time.”

Also it should be noted that where exemption is claimed under Section 13(a) of the Fair Labor Standards Act of 1938 (29 U. S. C., Sec. 213(a)), the test is the primary business of the *employer* not the particular activity of the employee. The emphasis of the language of the section is on the nature of the establishment of the employer, not the activity of the particular employee. The primary business of the industrial feeding contractor is to operate a restaurant which is a "service establishment" and which is, therefore, clearly exempt.

Conclusion.

It is respectfully submitted, therefore, that the order and judgment of the District Court of the United States for the Southern District of California, Central Division, is correct and should be affirmed. Appellants are not covered by the Fair Labor Standards Act of 1938, and therefore appellants' third amended complaint does not state a claim upon which relief could be granted by the Court below.

Respectfully submitted,

JOHN MOORE ROBINSON,

ROBERT M. HIMROD,

By JOHN MOORE ROBINSON,

Attorneys for Respondent Bearl Sprott Company, Inc.

No. 11868

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

THELMA TIPTON, ET AL., APPELLANTS

v.

BEARL SPROTT COMPANY, INC., A CORPORATION, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION**

**BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS
AMICUS CURIAE**

WILLIAM S. TYSON,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

FREDERICK U. REEL,
JOSEPH D. MLADINOV,
Attorneys,

United States Department of Labor.

KENNETH C. ROBERTSON,
Regional Attorney.

FILED

SEP 4 - 1948

PAUL P. O'BRIEN

INDEX

	Page
Jurisdiction.....	1
Statement of the case.....	2
Questions presented.....	2
Summary of argument.....	3
Argument:	
I. Employees employed in a cafeteria, located in the plant of an interstate steel manufacturer and serving substantially all the employees of the plant but not open to the public, are within the coverage of the Act.....	4
II. The issue of coverage should not have been determined adversely to appellants prior to trial.....	14
III. The plant cafeteria is not a retail or service establishment..	16
Conclusion.....	18
Appendix.....	19

CITATIONS

Cases:

<i>Armour & Co. v. Wantock</i> , 323 U. S. 126.....	8, 9
<i>Basik v. General Motors Corp.</i> , 311 Mich. 705, 19 N. W. (2d) 142..	9, 16
<i>Boutell v. Walling</i> , 327 U. S. 463.....	18
<i>Burton v. Zimmerman</i> , 131 F. (2d) 377.....	15
<i>Carroll v. Morrison Hotel Corp.</i> , 149 F. (2d) 404.....	15
<i>Castaing v. Puerto Rican American Sugar Refinery, Inc.</i> , 145 F. (2d) 403.....	15
<i>City of St. Louis v. St. Louis Theater Co.</i> , 202 Mo. 690, 100 S. W. 627.....	16
<i>Coast Van Lines v. Armstrong</i> , 167 F. (2d) 705.....	4, 17, 18
<i>Consolidated Timber Co. v. Womack</i> , 132 F. (2d) 101.....	3,
	4, 5, 6, 7, 8, 9, 10, 12, 15, 17, 18
<i>Continental Collieries v. Shober</i> , 130 F. (2d) 631.....	15, 16
<i>Davila v. Porto Rico Ry. Power & Light Co.</i> , 143 F. (2d) 236.....	15
<i>DeLoach v. Crowley's, Inc.</i> , 128 F. (2d) 378.....	15
<i>Ferguson v. Prophet Co.</i> , 6 W. H. Cases 284.....	9
<i>Hanney v. Franklin Fire Ins. Co.</i> , 142 F. (2d) 864.....	15
<i>Hanson v. Lagerstrom</i> , 133 F. (2d) 120.....	9
<i>Kirschbaum Co. v. Walling</i> , 316 U. S. 517.....	3, 5, 6, 18
<i>Koehler v. Jacobs</i> , 138 F. (2d) 440.....	15
<i>Kuhn v. Canteen Food Service Inc.</i> , 150 F. (2d) 55, 4 W. H. Cases 913.....	9
<i>Leimer v. State Mutual Life Assur. Co.</i> , 108 F. (2d) 302.....	14
<i>McLeod v. Threlkeld</i> , 319 U. S. 491.....	8, 9, 18
<i>Martino v. Michigan Window Cleaning Co.</i> , 327 U. S. 173....	3, 6, 13, 18
<i>Musteen v. Johnson</i> , 133 F. (2d) 106.....	15
<i>Relander v. Mason County Logging Co.</i> , 2 W. H. Cases 1052.....	9

Cases—Continued

Page

<i>Roland Electrical Co. v. Walling</i> , 326 U. S. 657.....	6, 9, 11, 13, 17, 18
<i>Southern Pacific Co. v. Conway</i> , 115 F. (2d) 746.....	16
<i>Sparks v. England</i> , 113 F. (2d) 579.....	14
<i>State v. Small</i> , 126 Me. 235, 137 Atl. 398.....	16
<i>Stratton v. Farmers Produce Co.</i> , 134 F. (2d) 825.....	15
<i>Tahir Erk v. Glenn L. Martin Co.</i> , 116 F. (2d) 865.....	15, 16
<i>Ware v. Travelers Ins. Co.</i> , 150 F. (2d) 463.....	14

Statutes:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 et seq.:	
Sec. 13 (a) (2).....	2, 17
Sec. 16 (b).....	2
Judicial Code Section 24 (8) (28 U. S. C., sec. 41 (8)).....	2
Judicial Code, Section 128 (28 U. S. C., sec. 225).....	2

Miscellaneous:

Address of Alberta M. Macfarlane, Educational Director, National Restaurant Association, extracts reprinted in <i>Nutrition in Industry</i> (1942), Canadian Department of Pensions and National Health.....	
Aspley and Whitmore, <i>Nutrition Program for Workers</i> , Industrial Relations Handbook, 1943, pp. 734 et seq.....	13
<i>Canteens in Industry</i> (published in 1942 by the Industrial Welfare Society) p. 6.....	14
Haggard and Greenberg, <i>Diet and Physical Efficiency—Influence of Frequency of Meals upon Physical Efficiency and Industrial Productivity</i> (1935).....	12
<i>Industrial Feeding in Manufacturing Establishments</i> (1944), United States War Food Administration p. 1.....	14
<i>Industrial Lunch Rooms</i> (1928) National Industrial Conference Board, p. 55.....	12
Lansburgh and Spriegel, <i>Industrial Management</i> (1940), p. 333..	13
Metropolitan Life Insurance Company Policy Holders Service Bureau, <i>Lunchrooms for Employees</i> (1942).....	14
Monthly Labor Review, Volume 2 (1916), pp. 69–70, 91.....	12
Monthly Labor Review, Volume 7 (1918), pp. 218–221, 284.....	12
Monthly Labor Review, Volume 16 (1923), pp. 1–9.....	12
National Association of Manufacturers, <i>Industrial Health Practices</i> (1941).....	13
National Research Council, <i>The Food and Nutrition in Industry, in Wartime</i> , First Report of Commission on Nutrition in Industry, No. 110 (1942).....	13
National Restaurant Association News-Letter, Educational Department Bulletin No. 27, May 24, 1945.....	13
9 Wigmore on Evidence 547, Sec. 2511 (3d Edition, 1940).....	16
<i>Nutrition in Industry</i> , Part I, Nutrition in Canadian Industry, contributed by Lionel Bradley Pett, Ph. D., M. D., Chief, Division of Nutrition, Department of National Health and Welfare, Ottawa, pp. 18, 42.....	12

Miscellaneous—Continued

Page

<i>Plant and Community Facilities and Services Guide</i> , Bureau of Manpower Utilization, War Manpower Commission (1943), p. 12-----	12
Rule 8, Federal Rules of Civil Procedure-----	16
Statutory Rules and Orders, 1940, No. 1993 of Vol. II, p. 408---	12
Vicary, <i>Labor Management and Food</i> , 26 Harvard Business Re- view 305 (1948)-----	14

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11868

THELMA TIPTON, ET AL., APPELLANTS

v.

BEARL SPROTT COMPANY, INC., A CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS
AMICUS CURIAE

The Administrator of the Wage and Hour Division, United States Department of Labor, is charged with the duty and responsibility of administering and enforcing the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060; 29 U. S. C., sec. 201 et seq.), hereinafter referred to as "the Act." Since this case presents significant questions concerning the scope of the coverage of the Act, the Administrator, with leave of Court, respectfully submits this brief as *amicus curiae*.

JURISDICTION

This is an appeal from a final judgment (R. 9-10) of the District Court of the United States for the Southern District of California, Central Division, dis-

missing, for failure to state a claim upon which relief could be granted, the third amended complaint of the appellants in an action instituted pursuant to Section 16 (b) of the Act to recover unpaid overtime compensation, an additional equal amount as liquidated damages, and a reasonable attorney's fee.

The district court had jurisdiction of the case under Section 16 (b) of the Act and Section 24 (8) of the Judicial Code (28 U. S. C., sec. 41 (8)). The jurisdiction of this Court over this appeal arises under Section 128 of the Judicial Code (28 U. S. C., sec. 225).

STATEMENT OF THE CASE

Since the case arises on a motion to dismiss the complaint the facts are those stated in the complaint (R. 2-7), and summarized at pages 2-3 of Appellant's Brief.

QUESTIONS PRESENTED

1. Whether employees employed in a cafeteria, located in the plant of an interstate steel manufacturer and serving substantially all the employees of the plant and business visitors, but not open to the general public, are engaged in occupations necessary to the production of goods for interstate commerce within the meaning of the Act.

2. Whether such employees are within the exemption provided by Section 13 (a) (2) of the Act for employees engaged in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.

SUMMARY OF ARGUMENT

This Court's decision in *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101, is controlling here and requires reversal of the decision below. In *Womack* this Court held that cookhouse employees serving meals to workers producing goods for commerce were employed in an occupation necessary to the production of goods for commerce within the meaning of the Act. The Act was held applicable in *Womack* even though the majority of the employees did not use the cookhouse, and even though the cookhouse served the general public. It follows *a fortiori* that the Act applies here where substantially all the employees patronize the cafeteria which is not open to the general public. Appellee's attempt to distinguish *Womack* as resting on the inaccessibility of other eating places is unsupported by the facts of that case. Equally unsupportable is the attempted distinction that in *Womack* the manufacturer himself operated the cafeteria, for such a distinction between manufacturer and contractor operation has been squarely rejected by the Supreme Court in *Kirschbaum Co. v. Walling*, 316 U. S. 517, and *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173. Nor can the basic holding of *Womack* that in-plant feeding is "necessary to production" be successfully challenged; it is supported both by subsequent court decisions construing the Act, and by general industrial experience with in-plant feeding facilities. In any event it was error to dismiss the complaint since appellants would be entitled to an opportunity to prove such facts as the relationship between the cafeteria and production.

The argument that the cafeteria is an exempt retail or service establishment is likewise foreclosed by the *Womack* decision, *supra*, as well as by this Court's recent holding in *Coast Van Lines v. Armstrong*, 167 F. (2d) 705, both of which recognize that establishments which are not open to the general public are not within the exemption.

ARGUMENT

I

Employees employed in a cafeteria, located in the plant of an interstate steel manufacturer and serving substantially all the employees of the plant but not open to the public, are within the coverage of the Act

This Court in *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101, held that employees in a Glenwood, Oregon, cookhouse furnishing meals to loggers producing timber for interstate commerce as well as to members of the general public were engaged in an occupation necessary to the production of goods for interstate commerce within the coverage of the Act. We submit that this Court's decision in the *Womack* case applies *a fortiori* to the facts of the instant case.

A comparison of the facts in the *Womack* case with those in the case at bar discloses that the complaint here alleges facts clearly within the *Womack* rule. Thus, in *Womack* "the court found that the greater proportion of the company employees took their meals elsewhere than at the Glenwood cookhouse" (132 F. (2d) at 103). In the instant case "substantially all the employees" of the plant patronize the cafeteria (R. 4). In *Womack* the facilities were available not

only to the logging employees but also to employees of other companies and to the general public (132 F. (2d) at 103, 106). In the instant case the cafeteria “is open only to employees and business visitors * * * and not to the general public” (R. 4). In the *Womack* case this Court concluded that the work of the cookhouse employees “had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation ‘necessary to the production of goods for commerce’ ” (132 F. (2d) at 106, quoting *Kirschbaum Co. v. Walling*, 316 U. S. 517, 525–526). We submit that upon the similar, and indeed stronger, facts of this case the same result must follow here.

Appellee seeks to distinguish the *Womack* case on the grounds, first, that the cookhouse in that case was operated by the company which itself produced goods for commerce rather than by an independent contractor, and second, that the cookhouse in the *Womack* case was located in an inaccessible location and not, as in the instant case, in a city with other restaurant facilities. We submit that the first of these attempted distinctions is contrary to well-settled rules as to the coverage of the Act and that the second attempted distinction rests on a theory rejected in the *Womack* decision itself.

Appellee’s argument that the *Womack* case is distinguishable because the employer here operates the cafeteria under a contract with the manufacturer whereas in *Womack* the manufacturer operated his

own cookhouse is contrary to the well-settled rule that the applicability of this Act depends upon the relationship of the employees' duties to production for commerce and not upon whether the employer is himself producing goods for commerce or is rendering service to a producer. *Kirschbaum Co. v. Walling*, 316 U. S. 517, 524; *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173, 177; *Roland Electrical Co. v. Walling*, 326 U. S. 657, 664. Squarely in point here is the *Martino* decision holding that employees of a window washing concern were covered by the Act because they were engaged in cleaning factory windows pursuant to a contract between their employer and the manufacturer. Noting that the cleaning of windows was an occupation necessary to the production of goods, the Court stated:

If the services rendered in this case had been rendered by employees of respondent's customers engaged in the production of goods for interstate commerce, those employees would have come under the Act. Respondent's employees are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts. [327 U. S. at 176-177.]

Similarly in the instant case employees whose activities are covered by the Act under the *Womack* decision "are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts."

Appellee's contention that the *Womack* decision rests on the inaccessibility of other eating places and

that it is, therefore, inapplicable here because the employees are free to dine elsewhere proceeds, we believe, from a misreading of the *Womack* case. This Court in *Womack* expressly noted that “the greater proportion of the company employees took their meals elsewhere than at the Glenwood cookhouse” (132 F. (2d) at 103). Thus the *Womack* decision itself rejects as a test of coverage whether the employees producing goods for commerce had alternative places to eat. Appellee’s “accessibility” argument could have been made with more force in the *Womack* case itself than it can achieve here where “substantially all the employees” patronize the cafeteria (R. 4). As a matter of fact, a contention similar to appellee’s was advanced and expressly rejected in *Womack*. Appellee states (brief, p. 12) that if the cafeteria had closed “Presumably more workers would have brought their lunches and the rest would have eaten at nearby restaurants.” Cf. *Womack*: “* * * it is of no consequence to argue that the Company might have employed loggers residing in the vicinity who would not be under the necessity of eating at a cookhouse, because *it is not what could have been the fact, but what actually was the fact, upon which the decision must rest*” (132 F. (2d) at 107; italics supplied).¹

Finally appellee suggests that the employees here are not covered by the Act because their “services

¹ As shown in Point II, *infra*, if the inaccessibility of other eating places were an element necessary to the coverage of these employees, it was nevertheless error to dismiss the complaint because appellants would be entitled to an opportunity to develop at trial the facts with respect to the inaccessibility of other eating places.

are attentions to the personal needs of the workers and must be sharply distinguished from the situation where some service is rendered which contributes in some way to the manufacturing plant and its facilities" (brief, p. 13). Since, as we have seen, the relation between appellants and the production of goods for commerce is the same as that borne by the employees in the *Womack* case, appellee's contention amounts to little more than an attack on the holding in *Womack* that the furnishing of meals to employees producing goods for commerce is "necessary to production" within the meaning of the Act.

Appellee seeks to support this attack on the doctrine of the *Womack* case by citing *McLeod v. Threlkeld*, 319 U. S. 491. We submit that the *McLeod* case not only fails to support appellee here but on the contrary indicates Supreme Court approval of the *Womack* rule. In *McLeod*, the Court, dividing 5 to 4, held that a cook for a railroad crew was not "engaged in commerce." But the majority opinion explicitly stated that it was not concerned with the scope of "production of goods for commerce" since *McLeod's* duties were "completely outside that clause." 319 U. S. at 493. Moreover the Court has since made it clear that the *McLeod* case was limited to the scope of "engaged in commerce" and in distinguishing *McLeod* stated that "the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to produce goods for commerce." *Armour & Co. v. Wantock*, 323 U. S. 126, 131. The clear implication that

the Court would have reached a different result in *McLeod* had the employee there been able to rely on the “necessary to” concept of coverage is further supported by the fact that both the majority and dissenting opinions in *McLeod* cite the *Womack* case with apparent approval. 319 U. S. at 493, 501.²

In urging that appellants are not engaged in work “necessary” to production, appellee “would give an unwarranted rigidity to the application of the word ‘necessary’ which has always been recognized as a word to be harmonized with its context. See *McCulloch v. Maryland*, 4 Wheat. 316, 413, 414” (*Armour & Co. v. Wantock*, 323 U. S. 126 at 129–130). To establish that an employee is engaged in an “occupation necessary to the production of goods for commerce” the statute “does *not* require that the occupation in which he is employed be *indispensable* to the production under consideration” (*Roland Electrical Co. v. Walling*, 326 U. S. 657 at 664; italics by the court). In the instant case the employees

² The *Womack* case has been followed by appellate courts both prior and subsequent to the *McLeod* decision. *Hanson v. Lagerstrom*, 133 F. (2d) 120 (C. C. A. 8); *Basik v. General Motors Corp.*, 311 Mich. 705, 19 N. W. (2d) 142; see also *Ferguson v. Prophet Co.*, 6 W. H. Cases 284 (S. D. Ind.). Appellee relies on two lower court decisions to the contrary. *Kuhn v. Canteen Food Service Inc.*, 4 W. H. Cases 913 (N. D. Ill.), appeal dismissed for want of final judgment, 150 F. (2d) 55 (C. C. A. 7); *Relander v. Mason County Logging Co.*, 2 W. H. Cases 1052 (Superior Ct., Thurston County, Washington). The *Kuhn* case rests in part on the district court decision in *Castaing v. Puerto Rican American Sugar Refinery, Inc.*, which had been reversed shortly before the *Kuhn* decision, 145 F. (2d) 403 (C. C. A. 1), and the *Relander* case rests on the district court decision in *Womack*, subsequently reversed in part by this Court.

bear the same "close and immediate tie with the process of production" as the employees in the *Womack* case (132 F. (2d) at 106). That the relationship is in fact "close and immediate" is substantiated by the facts in the instant case and by general industrial experience.

The relationship between the cafeteria workers and the production activities of the steel company is attested not only by the fact that the company has turned over a portion of its plant for the purpose of providing meals for its employees and business visitors, but also by the close control exercised by the steel company over the cafeteria. The steel company owns the greater part of the cafeteria furniture, utensils, kitchen equipment, and tableware. It regulates the hours of operation and the prices charged in the cafeteria, and even the menus offered there, all for the purpose of accommodating the needs and schedules of the steel company's employees (R. 4). The steel company's control over the cafeteria is indicative of its recognition of the relationship between in-plant feeding and efficient operation of productive facilities.

The relationship between in-plant feeding and production is likewise attested by general industrial experience which refutes appellee's assertion that the abandonment of the cafeteria would not "have caused a ripple in the production of Columbia Steel Company" (brief, p. 12). The following excerpts from letters of leading industrial concerns to the War Food Administration emphasize the marked relationship between the existence of in-plant feeding facilities

and increased production:³ “It has been our experience * * * that there is no single thing * * * which helps [more] to maintain the high rate of production * * * than to operate a good, economical industrial food service” (Philco Corporation). “Our production per man-day is materially greater than was the case prior to our having a cafeteria * * *.” (Gay Engineering Company of Los Angeles.) “* * * in-plant feeding is beneficial both from a welfare and production standpoint” (Fleetwing, Division of Kaiser Cargo, Inc.). “The increased production * * * has in great measure been contributed to by in-plant feeding” (Bakewell Aircraft Products Company of Los Angeles). “* * * our cafeteria is a material factor in maintaining production” (Du Pont Company). The experience of these industries with in-plant feeding facilities demonstrates that the maintenance of such facilities is not “merely a comfort and convenience” (appellee’s brief, p. 6), and establishes that in their view to eliminate in-plant feeding would “handicap the production” (*Roland Electrical Co. v. Walling*, 326 U. S. 657, 664).⁴

³ Extracts from these letters are contained in *Nutrition in Industry*, published by the International Labor Office in 1946. For the convenience of the Court we have reprinted the extracts there contained in the Appendix, *infra*.

⁴ Canadian industrial experience is similar. “* * * many industrialists speak of the value of the installation of such [in-plant feeding] facilities as a morale builder and in *increasing the productivity of the workers*. A good midshift meal is known definitely to cut down on the afternoon lag, and thus *production is kept up to a high level*. Midmorning and afternoon break periods with nutritious food available have been found by many to

The relationship between in-plant feeding and production is likewise recognized by Government agencies,⁵ by employer organizations,⁶ by the food service

increase production or keep production at the same level when the work is tedious. * * * It has also been indicated that if an optimal physical condition is to be promoted, and *high per capita production made possible*, management must assume an active responsibility in the matter of worker nutrition. For management to do so is wise self-interest rather than philanthropy * * *." *Nutrition in Industry, supra*, Part I, Nutrition in Canadian Industry, contributed by Lionel Bradley Pett, Ph. D., M. D., Chief of the Division of Nutrition of the Department of National Health and Welfare, Ottawa, pp. 17, 42 [italics supplied].

⁵ See *Industrial Feeding in Manufacturing Establishments*, published in 1944 by the United States War Food Administration, which states (p. 1) that the Industrial Feeding Program had as its two fold purpose "(1) to encourage the installation, expansion, and improvement of food service facilities in all plants where industrial feeding is practicable; (2) to assist industrial food services in providing the food needed by workers to maintain and improve health and production efficiency." See also *Plant and Community Facilities and Services Guide*, published by the Bureau of Manpower Utilization, War Manpower Commission (1943), p. 12: "The rate and quality of production * * * is directly influenced by the provision of nutritious food through adequate and accessible eating facilities in the plant and in the community." See also *Monthly Labor Review*, Volume 7, pp. 218-221, 184 (1918); Volume 16, pp. 1-9 (1923). For the comparable English experience, see *Monthly Labor Review*, Volume 2, pp. 69-70, 91; Volume 7, pp. 46-47, 53. The English wartime requirement that manufacturing establishments with over 250 employees establish an in-plant industrial feeding unit is contained in Statutory Rules and Orders, 1940, No. 1993 of Vol. II, p. 408. The English practice is summarized in *Canteens in Industry* (published in 1942 by the Industrial Welfare Society) which states (p. 6): "The works canteen has become an accepted and essential part of large-scale industry and few would deny its benefits from the point of view of health, efficiency, and well-being."

⁶ As stated by the National Industrial Conference Board, *Industrial Lunch Rooms* (1928), p. 55: "* * * a number of com-

industry,⁷ and by experts in industrial management.⁸ For the convenience of the Court we have reprinted in the Appendix, *infra*, excerpts from a report of the International Labor Office indicating the widespread recognition of the importance of in-plant feeding to production. Thus general industrial experience as well as the weight of judicial authority fully supports

panies that find it urgent to install luncheon facilities for their employees, but impractical to engage in a program of management and finance foreign to their business, deem it advisable to turn the management of their cafeterias over to concessionaires. Reasonable financial loss has not deterred employers from continuing to furnish such luncheon facilities * * *. It is evident, therefore, that the industrial lunchroom is not a profitable undertaking, but this a minor consideration to many who find its advantages heavily outweighing its drawbacks." See also National Association of Manufacturers, *Industrial Health Practices* (1941). Cf. *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173, 176, n. 4.

⁷ "If you are a [plant cafeteria] manager in this position [forced to charge high food prices to pay for light, fuel, and rent] try selling the company on the importance of nutrition in its relation to production. Sell the idea of keeping the worker fit * * *." Address of Alberta M. Macfarlane, Educational Director, National Restaurant Association, extracts reprinted in *Nutrition in Industry* (1942), Canadian Department of Pensions and National Health. See also National Restaurant Association News-Letter, Educational Department Bulletin No. 27, May 24, 1945. Cf. *Roland Electrical Co. v. Walling*, 326 U. S. 657, 664, n. 2.

⁸ "The maintenance of plant restaurants and cafeterias has become almost universal. Even when the neighborhood is blessed with fairly good places to eat, it has come to be regarded as desirable to institute a plant cafeteria. This makes possible not only the development of *esprit de corps* through meeting of fellow workers, but insures that workers will toil through the afternoon hours properly nourished. It is these features that make the restaurant a dividend paying investment." Lansburgh and Spriegel, *Industrial Management* (1940), p. 333; see also National Research Council, *The Food and Nutrition of Industrial*

the conclusion reached by this Court in the *Womack* case that employees who are employed for the purpose of furnishing meals to employees producing goods for commerce are themselves engaged in an occupation necessary to the production of goods for commerce within the meaning of the Fair Labor Standards Act.

II

The issue of coverage should not have been determined adversely to appellants prior to trial

As we have seen the facts alleged in the complaint are sufficient to establish the coverage of the Act under the controlling decisions of the Supreme Court and of this Court. But even under appellee's theory of the law, it was error to dismiss the complaint prior to trial.

It is well-settled that "There is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." *Leimer v. State Mutual Life Assur. Co.*, 108 F. (2d) 302, 306 (C. C. A. 8); *Sparks v. England*, 113 F. (2d) 579, 582 (C. C. A. 8); accord: *Ware v. Travelers Ins.*

Workers in Wartime, First Report of Commission on Nutrition in Industry, No. 110 (1942); Vicary, *Labor Management and Food*, 26 Harvard Business Review 305 (1948); Aspley and Whitmore, *Nutrition Program for Workers*, Industrial Relations Handbook, 1943, pp. 734, et seq.; Haggard and Greenberg, *Diet and Physical Efficiency—Influence of Frequency of Meals Upon Physical Efficiency and Industrial Productivity* (1935); Metropolitan Life Insurance Company Policy Holders Service Bureau, *Lunchrooms for Employees* (1942).

Co., 150 F. (2d) 463, 465 (C. C. A. 9); *Hannev v. Franklin Fire Ins. Co.*, 142 F. (2d) 864, 866 (C. C. A. 9); *Carroll v. Morrison Hotel Corp.*, 149 F. (2d) 404, 406 (C. C. A. 7); *Koehler v. Jacobs*, 138 F. (2d) 440, 443 (C. C. A. 5); *Tahir Erk v. Glenn L. Martin Co.*, 116 F. (2d) 865, 870 (C. C. A. 4); *Continental Collieries v. Shober*, 130 F. (2d) 631, 635 (C. C. A. 3). This rule is particularly applicable in actions under the Fair Labor Standards Act where the courts have recognized the “special necessity * * * ‘for having a detailed knowledge of all pertinent facts relative to the nature of an employer’s business and of the work done for him by an employee, before attempting to reach a conclusion as to whether the employee is or is not entitled to the [wage and hour] benefits * * * of the Act.’ ” *Stratton v. Farmers Produce Co.*, 134 F. (2d) 825, 827 (C. C. A. 8); accord: *Musteen v. Johnson*, 133 F. (2d) 106, 108 (C. C. A. 8); *DeLoach v. Crowley’s Inc.*, 128 F. (2d) 378, 380 (C. C. A. 5); *Burton v. Zimmerman*, 131 F. (2d) 377 (C. C. A. 4); *Davila v. Porto Rico Ry. Power & Light Co.*, 143 F. (2d) 236, 238 (C. C. A. 1); *Castaing v. Puerto Rico American Sugar Refinery*, 145 F. (2d) 403 (C. C. A. 1).

In the instant case as we have seen (Point I, *supra*) the complaint alleges facts which establish the coverage of the Act under the *Womack* decision and other decisions of the Supreme Court and of this Court. But even if the limitations which appellee seeks to engraft on those decisions could properly be imposed, appellants would still be entitled to an opportunity to prove the facts which appellee regards as essential

to coverage. For example, although the inaccessibility of other eating places is not an essential element of establishing the applicability of the Act, even if it were an element, appellants would be entitled to go to trial to prove its existence. The "accessibility" of other eating places would depend not only upon the presence in the vicinity of other restaurants (a matter probably not within the scope of judicial notice; see 9 Wigmore on Evidence 547, 548, Sec. 2511 (3d Edition, 1940); *State v. Small*, 126 Me. 235, 137 Atl. 398; *City of St. Louis v. St. Louis Theater Co.*, 202 Mo. 690, 100 S. W. 627; but cf. appellee's brief, p. 10), but also upon whether any such restaurants were of a type within the means of, and otherwise suitable for, the employees of the plant, whether the employees were permitted to leave the plant to eat and were given sufficient time to do so, and other similar facts. If these matters were relevant as appellee contends, they could be developed at a trial but they need not, and indeed should not, be detailed in a complaint. See Rule 8, Federal Rules of Civil Procedure; *Southern Pacific Co. v. Conway*, 115 F. (2d) 746, 750 (C. C. A. 9), and cases cited; *Continental Collieries v. Shober*, 130 F. (2d) 631, 635 (C. C. A. 3); *Tahir Erk v. Glenn L. Martin Co.*, 116 F. (2d) 865, 870 (C. C. A. 4).

Appellee also vigorously contends that there is no direct relationship between the maintenance of the cafeteria and the production of the steel company. As a matter of law, this contention would appear to be foreclosed by the *Womack* decision and other cases discussed in Point I, *supra*. Insofar as the contention

raises a question of fact, it cannot be resolved on the basis of the pleadings alone. Although the industrial and governmental authorities cited in Point I, *supra*, would appear to be sufficient to establish appellants' case on this point, appellants might wish to introduce the testimony of employees and officials of the Columbia Steel Company on this point or they might wish to introduce expert testimony as was done in *Basik v. General Motors Corp.*, 311 Mich. 705, 19 N. W. (2d) 142, which also involved the coverage under the Act of workers in a plant cafeteria. Thus, even under appellee's theory of the law, appellants' complaint stated a claim within the scope of the Act, and should not have been dismissed prior to trial.

III

The plant cafeteria is not a retail or service establishment

Appellee contends (brief, pp. 14–15), that the cafeteria is an exempt retail or service establishment under Section 13 (a) (2) of the Act which exempts from the minimum wage and overtime provisions employees “engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce.” This contention, not passed upon by the district court, is foreclosed by the decision of the Supreme Court in *Roland Electrical Co. v. Walling*, 326 U. S. 657, 675–678, and by this Court's decisions in *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101, and *Coast Van Lines v. Armstrong*, 167 F. (2d) 705. Since the cafeteria in this case serves only employees and business visitors and is not open to the general public, it falls outside

the scope of the exemption as construed in the *Roland*, *Womack*, and *Armstrong* cases. Moreover, even if the cafeteria were a service establishment, the decisions of the Supreme Court and of this Court cast considerable doubt on whether the greater part of the "servicing" would be in intrastate commerce. See *McLeod v. Threlkeld*, 319 U. S. 491, 494, n. 6; *Boutell v. Walling*, 327 U. S. 463, 467; *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101, 107 (C. C. A. 9); see also *Kirschbaum Co. v. Walling*, 316 U. S. 517, 526; *Roland Electrical Co. v. Walling*, 326 U. S. 657, 667; *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173, 177.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

WILLIAM S. TYSON,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

FREDERICK U. REEL,
JOSEPH D. MLADINOV,
Attorneys,

United States Department of Labor.

KENNETH C. ROBERTSON,
Regional Attorney.

AUGUST 1948.

APPENDIX

Extracts from *Nutrition in Industry*, International Labor Office, Montreal, 1946, Part II: "The Wartime Food and Nutrition Programme for Industrial Workers in the United States" contributed by Robert S. Goodhart, M. D., Surgeon (R) USPHS, Chief of the Industrial Feeding Programs Division, Food Distribution Programs Branch, Production and Marketing Administration, U. S. Department of Agriculture, Washington.

III. WARTIME PROGRESS IN PROTECTING THE HEALTH OF INDUSTRIAL WORKERS THROUGH NUTRITIONAL MEASURES (PAGES 61-63)

In-plant feeding was a common practice in the United States before the war. A report on health practices in industrial establishments, published by the National Association of Manufacturers in the autumn of 1941¹ indicated that 41 percent of 2,064 manufacturing plants provided lunch rooms for their employees in 1940. A Nation-wide survey of manufacturing plants engaged in war work, conducted by the War Food Administration,² showed that, in March 1944, 49 percent had food service facilities. In table I the findings of the two studies are broken down

¹ National Association of Manufacturers: Industrial Health Practices (a Report of a Survey of 2,064 Industrial Establishments) (New York, 1941). (Footnote numbers in this appendix correspond to those in the original report.)

² U. S. Department of Agriculture: Industrial Feeding in Manufacturing Establishments, 1944 (a Report of Surveys Conducted by War Food Administration, Office of Distribution) (Washington, D. C., 1944).

according to plant employment sizes. The distribution of plants among the various sizes was similar in the two surveys.

The expansion of in-plant or industrial feeding during the war was actually much greater than it would appear to have been from the figures in table I. In 1939 there were about 7,800,000 workers in manufacturing industries³ while in 1944, about 16.5 million were so employed.⁴ About 75 percent of this number, or 12.6 million, were considered according to the statistics of the War Manpower Commission,⁵ to be engaged in war work (page 61).

TABLE I.—*Percentage of manufacturing plants with food services*

Plant employment size	National Association of Manufacturers survey (1940)	War Foods Administration survey (1944)
All sizes.....	41	49
1-249.....	25	28
250-499.....	37	46
500-999.....	50	63
1,000-1,999.....	65	-----
1,000-2,499.....	-----	80
2,000-over.....	77	-----
2,500-over.....	-----	91

³ *Ibid.*; See also, U. S. Department of Commerce, Bureau of the Census, Census of Manufacturers, 1939 (Washington, D. C., 1942).

⁴ U. S. Department of Labor, Bureau of Labor Statistics; Employment and Payrolls (Washington, D. C., 1945).

⁵ U. S. Department of Agriculture, *op. cit.*

TABLE II.—*Preliminary report on industrial feeding in metropolitan areas.¹ Possession of facilities, workers employed and being served midshift meals, food service, operation methods; for plants employing 1,000 or more workers as reported on industrial feeding program permanent record forms.*

[United States and regions, May 1945]

Metropolitan area ²	Plants			Workers						Food service operation methods					
	Total number with 1,000 or more workers ³	With facilities		Without facilities	Estimated total in all manufacturing ⁴	In plants reporting	In plants with facilities		In plants without facilities	Being served mid-shift meals		Management	Industrial feeding contractor	Employee operation	Not indicated
		Number	Per-cent				Number	Per-cent		Number	Per-cent				
United States totals (81 areas) -	936	780	83.3	156	7,984,300	4,603,300	4,178,800	90.7	424,400	2,194,400	54.6	232	306	12	230
Northeast region, 29 areas -	411	324	78.8	87	3,660,800	1,825,400	1,618,500	88.7	206,800	852,800	54.3	72	124	2	126
Southern region, 12 areas -	55	47	85.5	8	361,800	198,100	180,400	91.1	17,700	98,100	55.4	23	13	2	9
Midwest region, 26 areas -	351	307	87.5	44	2,792,400	1,667,000	1,538,700	92.3	128,300	887,700	57.7	104	123	6	74
Southwest region, 8 areas -	45	37	82.2	8	321,500	293,900	278,700	94.8	15,200	137,200	49.2	14	20	-----	3
Western region, 6 areas -	74	65	87.8	9	847,800	618,900	562,500	90.9	56,400	218,600	51.5	19	26	2	18

¹ U. S. Department of Agriculture, Industrial Feeding Program permanent record forms, July 1945.

² Bureau of Census, U. S. Department of Commerce.

³ Represents 80 percent of total number of plants of this size in 81 metropolitan areas. Assuming the coverage employment of the larger plants not reporting to be the same as those reporting, i.e., 4,919, the 234 plants not reporting account for

1,151,046 workers. It is probable, however, that the actual employment in these 234 plants was somewhat less.

⁴ Based on U. S. Census data, adjusted for June 1944.

⁵ Based on total of 4,015,400 workers in plants with facilities. Excludes 163,400 workers in 10 plants in 4 areas because of incomplete data on number being served.

EFFECT OF NUTRITION PROGRAMMES UPON WORKERS'
HEALTH, EFFICIENCY, AND PRODUCTIVITY (PAGES
80-84)

* * * * *

The considered opinion of industrialists who have made satisfactory food services available to their employees must carry considerable weight in an appraisal of the value of this practice.

The following quotations are typical of the opinions of industries having experience with good nutrition programs, as expressed in letters to the War Food Administration:

It is my opinion that the food service programme at this plant has been a big factor in the good relationships which exist between the company and its employees, and it has been a contributing factor to the fine morale which prevails here. The fact that a good morale does exist can be substantiated by such things as our absentee rate which is concurrently about 4 per cent and is lower than industry as a whole, and to our knowledge is the lowest absenteeism rate for any of the major plants in this community. Our accident rates are substantially less than the average for industry as a whole or for the food industry itself.

GENERAL FOODS CORPORATION.

POST PRODUCTS DIVISION,

Battle Creek, Mich.

It has been our experience and it is our belief that there is no single thing which tends [more] to cut down absenteeism and labour turnover or which helps [more] to maintain the high rate of production through increased morale than to operate a good, economical industrial food service.

PHILCO CORPORATION,

Philadelphia, Pennsylvania.

We are very well satisfied with the results shown since we have installed the cafeteria for our employees here in the plant * * *.

The record has shown that our absenteeism due to sickness has materially decreased. There has been a marked improvement in the morale of the workers. Our production per man-day is materially greater than was the case prior to our having a cafeteria, and we feel this is attributable to the elimination of fatigue resulting from improper midshift meals.

GAY ENGINEERING COMPANY,
Los Angeles, California.

We do not feel that in-plant feeding has too great a bearing on absenteeism and labour turnover, but we do firmly believe that it is important from a morale standpoint; also, hot, nourishing meals reduce fatigue, thereby resulting in increased production * * *.

To summarize, we believe that in-plant feeding is beneficial both from a welfare and production standpoint.

FLEETWINGS, DIVISION OF KAISER CARGO,
INCORPORATED,
Bristol, Pennsylvania.

Although we do not have any specific figures relative to the effects of in-plant feeding on absenteeism, labour turnover, increased production, etc., we do feel that a food service for our people is of definite value and we plan to continue and probably expand its facilities after the war.

COLGATE-PALMOLIVE-PEET COMPANY,
Jersey City, New Jersey.

The increased production that we have enjoyed in this plant of 37 percent has in great measure been contributed to by in-plant feeding.

BAKEWELL AIRCRAFT PRODUCTS Co.,
Los Angeles, California.

Because of production difficulties caused by high labor turn over and absenteeism the plant built and equipped a modern cafeteria * * * Labor turn-over the month before opening the cafeteria was 12.5 percent and is now down to 5.9 percent six months after the opening. Absenteeism has dropped in the same period from 9 percent to 4 percent.

ISAACSON IRON WORKS,
Seattle, Washington.

* * * * *

We feel that our cafeteria is a material factor in maintaining production, in reducing absenteeism and labor turn over and in maintaining good employee morale and labor relations.

E. I. DU PONT DE NEMOURS & COMPANY,
Pompton Lakes, New Jersey.

While these facilities and nutritious food are subsidized by the company in the amount of between \$4 and \$5 per employee per year, we feel that this comparatively small loss to the company is compensated many times over by the reduction in absenteeism and accidents, and the improved efficiency and happiness of well-fed workers.

DIAMOND CHAIN AND MANUFACTURING COMPANY,
Indianapolis, Indiana.

The October record of several employee absences established a new low record of 2.6 percent. It is important to note that absenteeism covers all causes * * *.

The number of absences from common illnesses has been reduced to a negligible and very satisfactory percentage. Much of this good record is due to the effectiveness of the continued promotion of our Industrial Nutrition Programme.

SERVELL, INCORPORATED,
Evansville, Indiana.

* * * * *

IV. CONCLUSION (PAGE 105)

The practice of providing industrial workers with an opportunity to obtain meals at their place of employment has grown so much in the United States during the past four years that it is now generally regarded as an integral pattern of American industrial society. At least of equal importance with the increased extent of industrial feeding is the change which has occurred in the concept held by both management and labour regarding its purpose.

Before the war, where industrial feeding did exist, it was customarily regarded merely as a convenience to the employees, as a means of livelihood to some former employee or his family or as a means of obtaining funds for employee recreational activities. At present its importance as a health measure and its relation to employee morale and industrial efficiency are more generally recognized.

No. 11868

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THELMA TIPTON, MARY FOSTER, EVA C. WHITNEY,
MARY F. DE BENEDETTI, CLARA OWENS TURNER,
TRINIDAD MORA, DOROTHY MORA, DORA GRAJEDA,
CONCHITA GRAJEDA, MARY TIBBITTS and GUSSIE
BOURNE,

Appellants,

vs.

BEARL SPROTT COMPANY, INC., a corporation, BEARL
SPROTT, individually and d/b/a BEARL SPROTT, DOE I,
DOE II, DOE III,

Appellees.

Reply to Brief of the Administrator of Wages and
Hours Division, United States Department of
Labor, Amicus Curiae.

JOHN MOORE ROBINSON,
ROBERT M. HIMROD,

917 Bank of America Building, Los Angeles 14,
Attorneys for Appellee Bearl Sprott Company, Inc.

TOPICAL INDEX

	PAGE
Argument	2
I.	
Appellee's business was a separate and independent entity which functioned not as a necessary facility in the production of steel products, but to supply the personal wants of those on the steel company's premises which wants existed separate and apart from their productive effort and would have existed whether steel was produced or not.....	2
II.	
The trial court correctly granted appellee's motion to dismiss for the reason that the court took judicial notice that the City of Torrance is in a heavily populated area with many restaurants, cafes, and lunch rooms, and, therefore, appellants would be unable to show inaccessibility and necessity. Such decision is, therefore, on the merits.....	6
III.	
The plant cafeteria in question is a retail or service establishment and thus appellants cannot be engaged in the production of goods for commerce.....	9

TABLE OF AUTHORITIES CITED

CASES	PAGE
Borden Co. v. Bordella, 325 U. S. 679.....	5
Consolidated Timber Co. v. Womack, 132 F. 2d 101.....	2, 3
Kirschbaum v. Walling and Arsenal Bldg. Corp. v. Walling, 316 U. S. 517.....	3
McLeod v. Threlkeld, 319 U. S. 491.....	4
10 E. 40th St. Building, Inc. v. Callus, 325 U. S. 578.....	3
Pennington v. Gibson, 16 How. 65, 14 L. Ed. 847.....	8
Roland Electric Co. v. Walling, 326 U. S. 657.....	4, 9, 10, 11, 13
Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223.....	7

STATUTES

Fair Labor Standards Act, Sec. 3(j).....	4
Fair Labor Standards Act, Sec. 7.....	9
Fair Labor Standards Act, Sec. 7(a).....	9, 10
Fair Labor Standards Act, Sec. 13(a)(2).....	9, 10, 11, 13
Federal Rules of Civil Procedure, Rule 43(a).....	7

TEXTBOOKS.

9 Wigmore on Evidence (3rd Ed.), pp. 572-577.....	7
---	---

No. 11868

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THELMA TIPTON, MARY FOSTER, EVA C. WHITNEY,
MARY F. DE BENEDETTI, CLARA OWENS TURNER,
TRINIDAD MORA, DOROTHY MORA, DORA GRAJEDA,
CONCHITA GRAJEDA, MARY TIBBITTS and GUSSIE
BOURNE,

Appellants,

vs.

BEARL SPROTT COMPANY, INC., a corporation, BEARL
SPROTT, individually and d/b/a BEARL SPROTT, DOE I,
DOE II, DOE III,

Appellees.

Reply to Brief of the Administrator of Wages and
Hours Division, United States Department of
Labor, Amicus Curiae.

A leave of Court first having been had and obtained
appellee Bearl Sprott Company, Inc., a corporation, here-
with presents its reply to the brief *amicus curiae* of the
Administrator of Wages and Hours Division, United
States Department of Labor.

ARGUMENT.

I.

Appellee's Business Was a Separate and Independent Entity Which Functioned Not as a Necessary Facility in the Production of Steel Products, but to Supply the Personal Wants of Those on the Steel Company's Premises Which Wants Existed Separate and Apart From Their Productive Effort and Would Have Existed Whether Steel Was Produced or Not.

Consolidated Timber Co. v. Womack (1942), 132 F. (2d) 101, is distinguishable from the instant situation before this Court by the following excerpts from the opinion:

“* * * we find ourselves well within the limitations—the lines drawn—in a case lately announced by the Supreme Court involving substantially the same basic question, *Kirschbaum v. Walling, and Arsenal Bldg. Corp. v. Walling*, 316 U. S. 517 * * *.

* * * * *

“* * * Here the cookhouse was a ‘necessary’ part of the Company’s production of goods for commerce. It was not operating with the intent or purpose of showing a profit to the owners from the sale of food or service, but to render a very necessary assistance to the business of the Company, which was the production of logs in interstate commerce. The cookhouse was not a separate or independent establishment; it was actually a *part* of the Company’s facilities—a link in the chain—whereby it operated its business and a means whereby it accomplished the purpose of its existence. * * *

“* * * each (cookhouse) is a unit in the facilities necessary to the Company’s production of goods for commerce. * * *”

Herein the appellee’s business, as disclosed by the complaint, was a separate and independent business which functioned not as a necessary facility to the production of goods by Columbia Steel Co., but to supply the purely personal wants of those on the steel company’s premises, which wants existed separate and apart from their productive efforts. In the *Womack* case the logging company therein involved operated the cookhouses as a facility needed in its production of logs. In the instant case the complaint contains no allegation which brings this case within the principles of the *Womack* case.

Two cases decided by the United States Supreme Court since the *Womack* decision clearly limit the extension of the principles of *Kirschbaum v. Walling* and *Arsenal Bldg. Corp. v. Walling* (1942), 316 U. S. 517 and emphasize the importance of the above distinction between the instant case and *Consolidated Timber Co. v. Womack*.

In *10 E. 40th St. Building, Inc. v. Callus* (1945), 325 U. S. 578, the court refused to extend *Kirschbaum v. Walling* and *Arsenal Bldg. Corp. v. Walling* to building maintenance employees employed by a company owning an office building as an independent local enterprise, although 47% of the tenants of the building were employees of producers for commerce. *10 E. 40th St. Building, Inc. v. Callus* definitely limits the principles of *Kirschbaum v. Walling* and *Arsenal Bldg. Corp. v. Walling* to occupations actually necessary to the physical processes of producing goods for commerce.

The *Womack* case must also be considered in conjunction with the subsequent case of *Roland Electric Co. v. Walling* (1945), 326 U. S. 657, wherein the court unmistakably limited the application of the word "necessary" as employed in Section 3(j) of the Act to occupations which are needed in the production of goods for commerce. Referring to what occupations are brought under the Act by Section 3(j), the court said, p. 664:

"It is enough that his occupation be '*necessary to the production.*' There may be alternative occupations that could be substituted for it but it is enough that the one at issue is *needed* in such production and would, if omitted, handicap the production."

Appellee respectfully submits that the complaint in the instant case contains no allegation showing that such occupations as dishwashing, cooking, serving lunches and refreshments are needed in Columbia Steel Company's production of its products.

Appellee persists in its view that *McLeod v. Threlkeld* (1943), 319 U. S. 491, is of material help in determining upon the legal insufficiency of the complaint in the instant case. This, for the reason that the opinion in the *McLeod* case contains facts expressly recognized by the United States Supreme Court, which, upon the record in the instant case, are just as true and in point herein as they were in the case in which they were stated. The following is an excerpt from the opinion in the *McLeod* case, page 497:

"* * * It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. *Food is consumed apart from their work. The furnishing of*

board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.” (Emphasis added.)

Support for defendant’s last above stated contention is furnished by the following excerpt from the dissenting opinion by Chief Justice Stone (joined in by Mr. Justice Roberts) in *Borden Co. v. Borella* (1945), 325 U. S. 679, 686, which is a building maintenance employees case under the “production of goods for commerce” clause of the Act:

“The fact that it is convenient or even necessary for the president of the company to ride in an elevator does not seem to me to meet the requirement of the statute that the occupation must be one necessary to the physical process of production. The statute includes those who are necessary to that process, but it does not also include those who are necessary to them. The manufacturing process could proceed without many activities which are necessary or convenient to the executive officers of a manufacturing company but which do not in any direct or immediate manner contribute to the manufacturing process, as did the services rendered in *Kirschbaum Co. v. Walling*, *supra*.

“The services rendered in this case would seem to be no more related, and no more necessary to the processes of production than the services of the cook who prepares the meals of the president of the company or the chauffeur who drives him to his office. Compare *McLeod v. Threlkeld*, 319 U. S. 491. All are too remote from the physical process of production to be said to be, in any practical sense, a part of or necessary to it.”

II.

The Trial Court Correctly Granted Appellee's Motion to Dismiss for the Reason That the Court Took Judicial Notice That the City of Torrance Is in a Heavily Populated Area With Many Restaurants, Cafes, and Lunch Rooms, and, Therefore, Appellants Would Be Unable to Show Inaccessibility and Necessity. Such Decision Is, Therefore, on the Merits.

Appellee's motion to dismiss was properly granted under the particular circumstances of this case. Appellants' complaint set forth in considerable detail their functions as employees of appellee, pointed out that the operations carried on by them were on the property of the Columbia Steel Company and that the Steel Company was unquestionably engaged in the production of goods for interstate commerce. It could be presumed that appellants in their third amended complaint, stated their case as strongly as possible, that if their case could have been put more strongly counsel would have done so. No showing of inaccessibility was made in the complaint and for all that is apparent from the record, the area close to the plant of the Columbia Steel Corporation could have been swarming with restaurants, cafeterias and lunchrooms. With the pleadings in this state it was possible to dismiss the complaint by reason of its failure to state a claim upon which relief could be granted, and in addition to predict that no complaint could be drawn based on the facts as they actually existed. This the court below could do, and did. This Honorable Court can also take judicial notice, as the Court below did, of the fact that the City of Torrance is in the midst of a metropolitan area of 3,500,000 people; that it is a large and substantial city

with many adequate restaurant, cafeteria and lunch room facilities. In addition, it is also a matter of common knowledge that box lunch sellers, traveling hamburger and sandwich stands and the housewife, packing a lunch box, provide meals preferred by many. The city of Torrance, as everyone knows, has been an established industrial, commercial and residential center for many years, and has been provided with all of the eating facilities economically justifiable. Laudable attempts of a manufacturing concern to provide attractive low cost meals on plant grounds or adjacent thereto, show a concern for the convenience of its labor force but fall far short of demonstrating that without in-plant feeding steel production would stop or be seriously curtailed or affected. In-plant feeding, where there is sharp outside competition, becomes merely one of a group of possible choices; where the individual workman will eat is dictated by considerations of quality, price, variety of menu, congeniality of surroundings, and is often-times controlled by the feeling of many men that they prefer to leave company property and seek a change of scenery and environment.

This Court, as well as the Court below, is entitled, under the law, to take judicial notice of such commonly accepted facts. Rule 43(a) of the Federal Rules of Civil Procedure provides that whichever of State or Federal Rules favors reception of evidence shall be followed. The leading case in California on the subject, cited and quoted at great length in IX Wigmore on Evidence, Third Edition, pp. 572-577, is *Varcoe v. Lee* (1919), 180 Cal. 338, 181 Pac. 223. This case involved the question whether a portion of Mission Street in the City of San Francisco, California, is a "business district." No evidence was before court or jury on this question, but the court never-

theless charged the jury that the place in question was a business district and that the speed limit on Mission Street was fifteen miles per hour. The Court said, page 344,

“It should perhaps be noted that the fact that the trial judge knew what the actual fact was and that it was indisputable would not of itself justify him in recognizing it. Nor would the fact that the character of the street was a matter of common knowledge and notoriety justify him in taking the question from the jury if there were any possibility of dispute as to whether or not that character was such as to constitute it a business district within the definition of the statute applicable. If such question could exist, the fact involved—whether the well-known character of the street was sufficient to make it a business district—was one for determination by the jury. But we have in this case a combination of the two circumstances. In the first place, the fact is indisputable and beyond question. In the second place, It is a matter of common knowledge throughout the jurisdiction in and for which the court is sitting.

“A consideration of the reasons underlying the matter of judicial notice and its fundamental principles leaves, we believe, but little doubt as to its applicability here. Judicial notice is a judicial shortcut, a doing away with the formal necessity for evidence because there is no real necessity for it. * * *”

This Court can take judicial notice of the character of the City of Torrance whether or not the Court below did so. An appellate court can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice. (*Pennington v. Gibson*, 16 How. 65, 14 L. Ed. 847.) Thus as the decision below was clearly correct, it should be sustained, if this Court believes that there is no room for factual dispute,

upon the principle of judicial notice. It is submitted that the complaint does set forth, however, sufficient facts to demonstrate that a finding on trial that appellants' efforts were necessary to the production of steel would be erroneous.

III.

The Plant Cafeteria in Question Is a Retail or Service Establishment and Thus Appellants Cannot Be Engaged in the Production of Goods for Commerce.

Section 13(a)(2) of the Act definitely provides something more than an exemption. Observe that under the express words of Section 13(a)(2) with respect to any employee engaged as therein stated, none of the provisions of Section 7 (that is, neither the "engaged * * * in the production of goods for commerce" nor the "engaged in commerce" or any of the other provisions of Section 7) have any application. It follows that if an employee is engaged as stated in Section 13(a)(2), then he necessarily is not "engaged * * * in the production of goods for commerce" within the meaning of Section 7(a). This must be true, notwithstanding the history and origin of Section 13(a)(2) as reviewed by the United States Supreme Court or the construction placed by that Court upon Section 13(a)(2) in *Roland Electric Co. v. Walling* (1946), 326 U. S. 657,* such history and origin and such

*The opinion in *Roland Electric Co. v. Walling* (1946), 326 U. S. 657, in discussing the origin of Section 13(a)(2), said that in the attempt to keep substandard intrastate goods from competing with interstate goods the only purpose in the exemption was to exempt retailers dealing with the ultimate consumer (pp. 669-671). It further points out that the distinction is basically between wholesale and retail and that "service" should be given a similarly restricted meaning (pp. 671-675).

construction being not in opposition to, and the decision in that case being in actual support of, appellee's argument herein to the effect that the complaint is legally insufficient to state a cause of action under Section 7(a) of the Act.

Moreover, the following excerpt from the opinion in that case, page 667:

“* * * To the extent that sales or services are necessary for the production of goods for interstate commerce they generally are by that hypothesis not sales or services to an ultimate consumer for his personal use and, accordingly, are neither ‘retail’ sales nor services of a comparable character, within the meaning of sec. 13(a)(2).”

actually supports the point under immediate consideration. Defendant concludes, therefore, that if any of its employees involved herein be engaged in any retail or service establishment within the meaning of Section 13(a)(2), then such employee is not “engaged * * * in the production of goods for commerce” within the meaning of Section 7(a).

Irrespective of the argument to the effect that Section 13(a)(2) must be considered in determining whether the complaint states a valid cause of action under Section 7(a) of the Act, appellee maintains that its business was a retail or service establishment within the meaning of Section 13(a)(2). This, because such establishment conforms to what the United States Supreme Court considers the characteristics of such an establishment to be. In this connection, it appears unnecessary to consider any United States Supreme Court decision other than *Roland Electric Co. v. Walling* (1946), 326 U. S. 657, since that de-

cision was rendered subsequent to the decision in the *Womack* case. It is believed that there is no other decision of the United States Supreme Court which contributes anything by way of explaining what are retail or service establishments within the meaning of Section 13(a)(2) which was not considered in *Roland Electric Co. v. Walling*.

Roland Electric Co. v. Walling involved employees of an independent company who were engaged in servicing electrical motors in the plants of manufacturing concerns engaged in producing goods for commerce. The court, after determining that the employees therein were engaged in producing goods for commerce, proceeded to consider whether they were exempt from the Act under Section 13(a)(2) and concluded that they were not. That result was reached on the ground that a retail or service establishment of the kind referred to in Section 13(a)(2) is one which sells to or serves ultimate individual, as distinguished from industrial or commercial, consumers. Appellee contends that its cafeteria was a retail or service establishment within the meaning of Section 13(a)(2) because it was the kind which accorded with the characteristics of such an establishment as determined by the court in *Roland Electric Co. v. Walling*. Following are applicable excerpts from the opinion in that case (pp. 666-667) :

“* * * * *

“If read in a detached and broad sense, it can be made to exempt from the Act the employees of the petitioner together with hundreds of thousands of other employees like them, to the serious detriment of the effectiveness of the Act, however, if read in connection with the declared purpose of the Act and in the

light of its legislative history and administrative interpretation, the clause does not reach employees 'engaged in the production of goods for commerce' as were those in this case. When so read, the exemption reaches employees of only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach. See §2, *infra*. Without this clause such local establishments might find themselves technically covered by the Act, not because they were producing goods for (interstate) commerce, but because, for example, they were retailing milk near a state line and, therefore, might be regarded as actually in interstate commerce when delivering retail sales of milk to local customers, all of whom were ultimate consumers of it for their personal use, but a small proportion of whom lived across the state line from the milk dealer.

* * * * *

"Similarly, it was felt that without this exemption clause, the employee of a local merchant who purchased his goods from outside his State but retailed them all within his State to ultimate consumers across his counter, might, nevertheless, technically be covered by the Act as being actually 'in (interstate) commerce' because of his purchases, although his sales all might be at 'retail' and beyond the end of the 'flow of goods in commerce.'

* * * * *

It is rare, if not impossible, for an employee who is engaged in an occupation necessary to the production of goods for interstate commerce to be said to be at the same time an employee engaged in a retail

or service establishment whose selling and servicing is confined to ultimate consumers. These employments are largely mutually exclusive.

* * * * *

Thus, it is to be seen that *Roland Electric Co. v. Walling* furnishes supreme authority for appellee's argument that its employees involved herein are engaged in a retail or service establishment of the kind referred to in Section 13 (a)(2). Appellee's cafeteria complied precisely with the characteristics of such establishment as determined by the United States Supreme Court.

Notwithstanding its location on the steel company's premises, appellee's cafeteria is "comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach." Appellee's cafeteria sold to and served ultimate individual, not commercial or industrial, consumers, who bought the same articles and for the same reasons as do "the customer of the local merchant, local grocer * * * who buys for his own personal consumption." Moreover, appellee's customers obviously bought the same things and required the same service irrespective of whether they were on the steel company's premises, at home or at play.

There was absolutely nothing that appellee produced or sold or served which "remained actively in use in the production of the 'flow of goods in commerce' " or contributed to the slightest extent to such "flow." Obviously, there are many things that transpire upon the steel company's plant premises which are beyond and wholly unrelated to the flow of goods in commerce. It is a part of human

conduct that things unrelated to the steel company's production occur on the steel company's plant premises, and merely because they occur on said premises while the employees of the steel company are at work thereon does not relate such things to the flow of goods in commerce. Stated more specifically, it is of controlling importance in the instant case that appellee's selling and servicing operations were not of service to the steel company but a service of convenience to those ultimate individual consumers who, while on the steel company's premises, might at any time or from time to time desire to make use thereof in the satisfaction of their purely personal wants which exist, aside from their productive efforts, while they are at home, at work or at play.

Respectfully submitted,

JOHN MOORE ROBINSON,

ROBERT M. HIMROD,

Attorneys for Appellee Bearl Sprott Company, Inc.

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM H. NOVICK and ANNETTA
NOVICK,

Appellants,

vs.

ANSON E. GOULDSBERRY,

Appellee.

Transcript of Record

Upon Appeal from the District Court
for the Territory of Alaska,
Third Division.

FILED

APR 24 1948

PAUL B. O'BRIEN,
CLERK

No. 11869

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM H. NOVICK and ANNETTA
NOVICK,

Appellants,

vs.

ANSON E. GOULDSBERRY,

Appellee.

Transcript of Record

Upon Appeal from the District Court
for the Territory of Alaska,
Third Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	9
Appeal:	
Certificate of Clerk to Transcript of Record on.....	129
Citation on.....	22
Petition for Allowance of.....	20
Statement of Points and Designation of Record on.....	131
Assignment of Errors.....	23
Bill of Exceptions.....	31
Defendants' Requested Instructions.....	115
Instructions to the Jury.....	99
Witnesses for Defendant:	
Carroll, Mrs. Lucille	
—direct	69
—cross	73
Friede, Patrick J.	
—direct	53
—cross	54
Hamilton, Joseph M.	
—direct	50
—cross	51
—redirect	52
—recross	52

INDEX	PAGE
Witnesses for Defendant—(Continued):	
Howell, Thomas E.	
—direct	88
—cross	90
Kerestine, Peter P.	
—direct	63, 92
—cross	64, 92
—redirect	65, 94
—recross	65
Novick, Mrs. Annetta	
—direct	65, 95
—cross	68
—redirect	69
Novick, William H.	
—direct	77, 94
Ottoson, Charlie	
—direct	55
—cross	58
—redirect	60
Peterson, Charlie C.	
—direct	61
—cross	62
Witnesses for Plaintiff:	
Gouldsberry, Anson E.	
—direct	31
—cross	39
—redirect	48
—rebuttal	80

INDEX	PAGE
Witnesses for Plaintiff—(Continued):	
Metcalf, Irvin L.	
—direct	81
—cross	82
Pallage, Henry J.	
—direct	49, 96
—cross	97
Shelton, Dr. J. H.	
—direct	82
—cross	83
—redirect	84
Certificate of Clerk to Transcript of Record on Appeal	129
Citation on Appeal.....	22
Complaint	2
Defendants' Exhibit A—Complaint for Viola- tion of Ordinance, /s/ P. P. Kerestine.....	124
B—Complaint for Viola- tion of Ordinance, /s/ Mr. and Mrs. Bill Carroll	125
Demurrer	8
Judgment	18

INDEX	PAGE
Minute Orders:	
1/ 3/47—Overruling Demurrer.....	8
9/15/47—Extending Time to Docket Case in Circuit Court of Appeals....	29
10/20/47—Extending Time to File and Docket Case With Circuit Court of Appeals.....	29
12/ 5/47—Granting Additional Time Within Which to Docket Cause With Circuit Court of Appeals.	30
1/16/48—Extending Time Within Which to Docket Case in Circuit Court of Appeals.....	30
Names and Addresses of Attorneys.....	1
Order Allowing Appeal and Supersedeas.....	21
Order Settling Bill of Exceptions.....	127
Petition for Allowance of Appeal.....	20
Praecipe for Transcript of Record.....	128
Reply	15
Statement of Points on Appeal and Designation of Parts of Record to Be Printed.....	131
Stipulation re Bill of Exceptions.....	126
Verdict No. 1.....	17

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

R. E. BAUMGARTNER,
Seward Alaska,

GEORGE B. GRIGSBY,
Anchorage, Alaska,

Attorneys for William H. Novick, Annetta
Novick, William Carroll, and Lucille
Carroll, defendants and appellants.

DAVIS & RENFREW,
Anchorage, Alaska,

Attorneys for Anson E. Gouldsberry, plain-
tiff and appellee.

In the District Court for the Territory of Alaska,
Third Division

No. S-4337

ANSON E. GOULDSBERRY,

Plaintiff,

vs.

WILLIAM H. NOVICK, ANNETTA NOVICK,
WILLIAM CARROLL AND LUCILLE
CARROLL,

Defendants.

COMPLAINT

Comes now the plaintiff above named, and for his cause of action against the defendants, and each of them, alleges as follows:

I.

That during all times hereinafter mentioned the defendant William H. Novick and the defendant Annetta Novick were, and they now are, husband and wife.

II.

That during all times hereinafter mentioned the defendant William Carroll and the defendant Lucille Carroll were, and they now are, husband and wife.

III.

That during all times hereinafter mentioned the defendants William H. Novick and Annetta Novick were, and they still are, the owners and operators of a certain public cocktail lounge at Seward, Alaska, known as Novick's Cocktail Lounge.

IV.

That during all times hereinafter mentioned the defendant William Carroll was the servant, agent and employee of William H. Novick and Annetta Novick in their cocktail lounge business known as Novick's Cocktail Lounge at Seward, Alaska, and defendant William Carroll, during all of such times was acting for and on behalf of [1*] the defendants William H. Novick and Annetta Novick and acting in the course of his employment as a servant and employee of such defendants.

V.

That on the 5th day of July, 1946, the plaintiff was lawfully on the premises owned and occupied by the defendants William H. Novick and Annetta Novick doing business as Novick's Cocktail Lounge at Seward, Alaska, and seated at the bar as a customer of such establishment, and that there were present at such time and place the defendants, Annetta Novick, William Carroll and Lucille Carroll as well as the plaintiff and several other customers of Novick's Cocktail Lounge.

VI.

That on such 5th day of July, 1946, and while plaintiff was upon the premises owned and controlled by the defendants William H. Novick and Annetta Novick at Seward, Alaska, and known as Novick's Cocktail Lounge, as above described, the said William Carroll, acting as agent, servant and

* Page numbering appearing at foot of page of original certified Transcript of Record.

employee of William H. Novick and Annetta Novick, as above described, without cause or provocation unlawfully and unjustly assaulted and battered plaintiff by striking plaintiff with great force and violence over the head with a bottle, and by knocking plaintiff violently to the floor.

VII.

That thereupon defendants William Carroll and Lucille Carroll and Annetta Novick beat plaintiff about his head and body with their fists and kicked plaintiff in various parts of his body with their feet, all as plaintiff lay partially stunned upon the floor near the bar of Novick's Cocktail Lounge and that during all of such time the other defendants were being incited and urged by the defendant Annetta Novick to beat and kick the plaintiff. [2]

VIII.

That by reason of the assault made upon plaintiff by defendants and by reason of the beating administered to plaintiff by the defendants, plaintiff's left ankle was broken, his lip was cut and he was cut near his left eye, his head was injured, he was scratched in numerous places, and he received bruises and contusions and abrasions over most of his body.

IX.

That after the plaintiff had been severely beaten by the defendants as above set out, without any provocation or just cause, defendants had plaintiff arrested by the Seward police and as a result of such arrest plaintiff, beaten and battered as he was,

and suffering from a broken ankle, was incarcerated in the Seward jail and denied medical assistance or the privilege of seeing friends or the right of giving bail, and that plaintiff was confined to jail under such circumstances for twelve hours before he was finally admitted to bail.

X.

That as a direct result of the beating administered to plaintiff by the defendants above described plaintiff was confined to the hospital at Seward, Alaska, for five days and incurred hospital bills in the sum of Thirty-five Dollars and medical fees in the sum of Fifty-two Dollars and that such sums were reasonable, necessary and proper.

XI.

That on the 5th day of July, 1946, and for a long time prior thereto, plaintiff was employed at Seward, Alaska, as a longshoreman and that in such employment plaintiff averaged Seven Hundred Fifty Dollars or more per month in wages. That as a direct result of the injuries inflicted upon plaintiff by the defendants, as above described, plaintiff was wholly unable to pursue his employment as a longshoreman for a period of three months after the 5th day of July, 1946, and the plaintiff has thereby been damaged in the sum of Two Thousand Two Hundred Fifty Dollars by reason of lost wages. [3]

XII.

That by reason of the assault made upon plaintiff by defendants and the injuries resulting therefrom,

and the neglect of his injuries after their infliction, plaintiff endured grievous pain, suffering and distress, and that such injuries still continue and for a long time to come will continue to cause pain and suffering to plaintiff. That as plaintiff is informed and believes and so alleges the fact to be, some of the injuries plaintiff received from the defendants are permanent in nature. That by reason of his arrest and incarceration in a filthy and loathesome common jail plaintiff has been humiliated. That by reason of such pain and suffering so far suffered by the plaintiff and pain and suffering which must be endured by the plaintiff in the future, as a result of his injuries at the hands of the defendants, and as a result of the indignities and the scorn and humiliation heaped upon plaintiff by reason of his arrest and incarceration at the instigation of defendants, plaintiff has been damaged in the additional sum of Fifteen Thousand Dollars.

XIII.

That in making the assault upon plaintiff and in beating him, and in causing his arrest and incarceration all as above set forth, the defendants, and each of them, acted maliciously and in wanton disregard of the rights and feelings of plaintiff, and by reason thereof plaintiff demands exemplary and punitive damages against said defendants in the sum of Five Thousand Dollars.

Wherefore, plaintiff prays for judgment against the defendants and each of them as follows:

1. For hospital and medical expenses incurred by him in the sum of \$87.00.

2. For the sum of \$2,250.00 for loss of wages.
3. For the sum of \$15,000.00 as and for compensatory damages. [4]
4. For the sum of \$5,000.00 as and for punitive damages.
5. For plaintiff's costs and disbursements in this action incurred.

DAVIS & RENFREW,

Attorneys for Plaintiff.

By /s/ EDWARD V. DAVIS.

United States of America,
Territory of Alaska—ss.

Anson E. Gouldsberry, being first duly sworn,
upon his oath, deposes and says:

That he is the plaintiff named in the within and foregoing Complaint, that he has read said complaint, knows the contents thereof and that the same is true as he verily believes.

/s/ ANSON E. GOULDSBERRY.

Subscribed and sworn to before me this 20th day
of November, 1946.

[Seal] /s/ EDWARD V. DAVIS,
Notary Public in and for the Territory of Alaska.
My commission expires November 7, 1950.

[Endorsed]: Filed Nov. 20, 1946. [6]

[Title of District Court and Cause.]

DEMURRER

Come now the defendants in the above-entitled action and demur to the Complaint of the Plaintiff filed herein, on the ground that several causes of action have been improperly united.

/s/ R. E. BAUMGARTNER,
Attorney for Defendants.

[Endorsed]: Filed Dec. 20, 1946. [7]

[Title of District Court and Cause.]

Minute Order

OVERRULING DEMURRER

Now at this time the plaintiff not being present in court but represented by William W. Renfrew of his counsel, the defendant not being present in court nor represented by counsel, and the Court being fully and duly advised in the premises,

It Is Ordered that defendant's demurrer to the complaint in cause No. S-4337, entitled Anson E. Gouldsberry, plaintiff, versus William H. Novick, Annetta Novick, William Carroll and Lucille Carroll, defendants, be, and it is hereby overruled, and defendant granted two weeks within which to answer.

Entered Court Journal No. G12, Page No. 440,
Jan. 3, 1947. [8]

[Title of District Court and Cause.]

ANSWER

Come now the defendants above-named, and for their answer to the Complaint of the plaintiff above-named, admit, deny and allege as follows:

I.

The defendants admit the allegations contained in paragraphs I, II and III of plaintiff's complaint.

II.

The defendants admit that the defendant William Carroll was in the employee of the defendants William H. Novick and Annetta Novick, in the place of business known as Novick's Cocktail Lounge, at Seward, Alaska; but challenge the implication concealed in said allegation as a device by which plaintiff seeks to hold defendants William H. Novick and Annetta Novick responsible for the personal behavior and conduct of the defendant William Carroll.

III.

Defendants admit that on the 5th day of July, 1946, the plaintiff was seated at the bar of Novick's Cocktail Lounge at Seward, Alaska, and further admit that there were present [9] at such time and place the defendants William Carroll and Lucille Carroll as well as several visitors and patrons, but deny that the defendant Annetta Novick was present while plaintiff was so seated at said bar.

Further answering paragraph V of plaintiff's complaint, the defendants allege that during all the

time that plaintiff was seated at, or standing near, the bar of the cocktail lounge aforesaid, the defendant Annetta Novick was attending to her duties in an adjacent store, being a business entirely separate and apart from the said cocktail lounge, and not connected by doors or otherwise with said cocktail lounge.

IV.

Defendants deny each and every allegation contained in paragraph VI of plaintiff's complaint, and allege that on the 5th July, 1946, defendant William Carroll was employed as a bartender at the Cocktail Lounge aforesaid and was on active duty; that the defendant Lucille Carroll was seated at said bar visiting with her husband, William Carroll, to whom she had been married only a short time; that defendant Lucille Carroll had obtained a divorce from plaintiff, Anson E. Gouldsberry, on the 27th May, 1946, and the plaintiff was desperate in his efforts to bring about a rupture in the marriage of defendants Lucille Carroll and William Carroll. That the plaintiff did then and there address the defendant Lucille Carroll in a most indecent, vile, bestial and threatening language, and did then and there make an assault upon the defendant Lucille Carroll; that the defendant William Carroll, in order to protect his wife and himself and to preserve the peace of the establishment of which he was in charge, did order the plaintiff to desist; but plaintiff, having in his hand a half-filled bottle of beer, which he had been wielding in a threatening manner, hurled said bottle at defendant William Car-

roll, [10] and having missed striking him with it, immediately grasped from the bar the bottle from which another patron had been drinking, and would have thrown it at defendant William Carroll with great force and violence and severely injured him with it, if defendant William Carroll had not immediately defended himself. That the defendant William Carroll did defend himself and his wife against said murderous and maniacal assault and in doing so did not use any more force than was reasonably necessary under the circumstances to protect his wife, and himself from injury, and to preserve the peace and protect the other persons lawfully present. That the defendant William Carroll endeavored only to persuade the plaintiff to depart therefrom or to cease his disturbance, and if plaintiff sustained any injury or damage, it was occasioned by plaintiff's first unlawfully threatening to do bodily harm to and assaulting the defendants Lucille Carroll and William Carroll, while defendant Lucille Carroll was peaceably attending to her own affairs and while defendant William Carroll was in the quiet and lawful discharge of his duties as bartender in complete charge of the said Cocktail Lounge.

V.

Defendants deny each and every allegation contained in paragraph VII of plaintiff's complaint.

Defendants allege that immediately following the insane attack on defendant William Carroll by the plaintiff, as alleged aforesaid, plaintiff became so uncontrollably violent, that both defendant Lucille

Carroll and defendant William Carroll were brutally attacked by plaintiff; that plaintiff beat the defendant William Carroll about the face and body, smashed defendant William Carroll's glasses while over his eyes; that plaintiff [11] threw the defendant Lucille Carroll on the floor and kicked her in the ribs and other parts of her body until she was unconscious, and thereafter continued to kick and maul her with the most horrible violence.

That during plaintiff's attack on defendant William Carroll and his wife, the defendant Lucille Carroll, defendant Annetta Novick left the store adjoining the Cocktail Lounge and hurried to the scene of plaintiff's attack on the defendants Carroll; that defendant Novick found defendant Lucille Carroll unconscious and endeavored to remove her from plaintiff's reach; that defendant was bleeding all over her face from the brutal beating given her by plaintiff, her former husband; and that the defendant Annetta Novick did not then or any other time, so much as touch the plaintiff, but only made every effort to persuade him to cease beating the defendants so mercilessly.

VI.

Defendants deny each and every allegation contained in paragraph VIII of plaintiff's complaint.

VII.

Defendants deny the allegations contained in paragraph IX of plaintiff's complaint, and especially deny that plaintiff has sustained any injury to his ankle, or otherwise suffered from any injury

as a result of his attack on defendants Lucille Carroll and William Carroll in the cocktail lounge aforesaid; and in this respect defendants allege that when plaintiff was arrested for the noise and disturbance that he was creating in said cocktail lounge, he was so wild and violent that the arresting officer required considerable assistance in the performance of his duty; that plaintiff was angrily and wildly kicking at every person and object within his reach. [12]

VIII.

Defendants deny the allegations contained in paragraph X of plaintiff's complaint.

IX.

Defendants have no knowledge of the matters contained in paragraph XI of plaintiff's complaint, and therefore deny all the allegations therein contained.

X.

Defendants deny the matters contained in paragraph XII of plaintiff's complaint, and allege that if plaintiff sustained any injuries, either as a result of his wild attack on the defendant William Carroll or the defendant Lucille Carroll, or as a result of his violent behavior after being forcibly removed from the cocktail lounge of defendants Novick, his willful neglect of same is hardly the fault of defendants.

Defendants allege that some of the injuries inflicted upon defendants Lucille Carroll and William Carroll by the said plaintiff may be permanent in nature.

Defendants deny that plaintiff suffered any indignities or humiliation at the hands of defendants, or either of them, and that the charges made by plaintiff in respect thereto are stupid, ridiculous, and insulting to the intelligence of any person reading the same.

XI.

Defendants deny the matters contained in paragraph XIII of plaintiff's complaint, and further

could not REB

allege that the plaintiff ~~cannot~~ possibly have been guided or prompted by reason and good judgment in REB

~~and~~ making so false and malicious an allegation as to [13] suggest the defendants responsible in any manner whatsoever for the outcome of his insanely jealous and violent display of temper; that plaintiff commenced and provoked the disturbance above mentioned, compelled the defendants Lucille Carroll and William Carroll to defend themselves against plaintiff's attacks; inflicted severe injury to defendants Lucille Carroll and William Carroll, that plaintiff knew that defendant William Novick was not even near the premises where plaintiff instigated his attacks, and that Annetta Novick pleaded with plaintiff to cease and desist from his brutal violence.

Wherefore defendants pray that the plaintiff's complaint be dismissed, that he be reprimanded for the insolence of his allegations and his utter, brazen disregard of the proprieties and common decencies of mankind.

/s/ R. E. BAUMGARTNER,

Attorney for Defendants. [14]

United States of America,
Territory of Alaska—ss.

William H. Novick, being first duly sworn, says he is one of the defendants in the above-entitled action and joins in the foregoing answer; that he has read said answer and that the facts and statements contained in said answer and defense are true to his own knowledge and belief; and does further say that he is materially interested in the said action and in the establishment of the foregoing defense thereto.

/s/ WM. H. NOVICK.

Sworn to and subscribed before me this 30th January, 1947.

[Seal] /s/ R. E. BAUMGARTNER,
Notary Public for Alaska.

Comm. exp. 17th Sept., 1947.

[Endorsed]: Filed Jan. 31, 1947. [15]

[Title of District Court and Cause.]

REPLY

Comes now Anson E. Gouldsberry, the plaintiff in the above entitled action, and by way of Reply to defendants' Answer, plaintiff denies each and all of the allegations of such Answer which are in conflict with the allegations of plaintiff's Complaint.

Wherefore, plaintiff having fully replied to defendants' Answer prays for judgment in this matter according to the prayer contained in plaintiff's Complaint.

DAVIS & RENFREW,
By /s/ EDWARD V. DAVIS,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska—ss.

Edward V. Davis, being first duly sworn, upon his oath, deposes and says:

That I am one of the attorneys for the plaintiff in the above-entitled action; that I make this verification for and on behalf of said plaintiff for the reason that said plaintiff is [16] not now present at the place where this verification is made, to wit: Anchorage, Alaska; that I have read the within and foregoing Reply, know the contents thereof, and that the matters and facts therein stated are true as I verily believe.

/s/ EDWARD V. DAVIS.

Subscribed and sworn to before me this 8th day of February, 1947.

[Seal] /s/ MARY E. FASNACHT,
Notary Public in and for the Territory of Alaska.
My comm. expires: 10/19/47.

[Endorsed]: Filed Feb. 13, 1947. [17]

In the District Court for the Territory of Alaska,
Third Division

No. S-4337

ANSON E. GOULDSBERRY,

Plaintiff,

vs.

WILLIAM H. NOVICK, ANNETTA NOVICK,
WILLIAM CARROLL and LUCILLE CAR-
ROLL,

Defendants.

VERDICT No. 1

We, the jury, duly selected, impaneled and sworn to try the above-entitled cause, do find for the plaintiff and against all of the defendants, and find that the plaintiff is entitled to recover from the defendants and each of them as compensatory damages the sum of \$2500 00/100; and we further find that the plaintiff is entitled to recover of and from each of the defendants as punitive damages the sum of \$1000 00/100.

Dated at Seward, Alaska, this 27th day of March, 1947.

/s/ H. W. CAMPEN,
Foreman.

Entered Court Journal No. G14, Page No. 158,
March 27, 1947.

[Endorsed]: Filed March 27, 1947. [31]

In the District Court for the Territory of Alaska,
Third Division

No. 4337

ANSON E. GOULDSBERRY,

Plaintiff,

vs.

WILLIAM N. NOVICK, ANNETTA NOVICK,
WILLIAM CARROLL and LUCILLE CAR-
ROLL,

Defendants.

JUDGMENT

The above-entitled action came on regularly for trial on the 26th day of March, 1947, before the above-entitled Court at Seward, Alaska, the plaintiff appearing in person and represented by Edward V. Davis, of his counsel, and the defendants, William H. Novick, Annetta Novick, and Lucille Carroll, appearing in person and represented by their attorney, R. E. Baumgartner, the defendant William Carroll not appearing in person but represented by R. E. Baumgartner, his attorney. A jury of twelve persons was regularly empaneled and sworn to try the cause, witnesses on behalf of the plaintiff and of the defendant were sworn and examined and evidence both oral and documentary was admitted by the Court. After hearing the evidence, the arguments of counsel and the instructions of the Court the jury retired to consider their verdict and subsequently returned into Court and rendered a verdict in favor of the plaintiff as follows:

“We, the jury, duly selected, impaneled and sworn to try the above-entitled cause, do find for the plaintiff and against all of the defendants, [74] and find that the plaintiff is entitled to recover from the defendants and each of them as compensatory damages the sum of \$2500.00; and we further find that the plaintiff is entitled to recover of and from each of the defendants as punitive damages the sum of \$1000.00.”

Wherefore, by virtue of the law and by reason of the premises aforesaid, It Is Hereby Ordered, Adjudged and Decreed that Anson E. Gouldsberry, the plaintiff, have and recover of and from the four defendants, jointly and severally, the sum of \$2500.00 as compensatory damages, together with the sum of \$1,000.00 as punitive damages and together with his costs and disbursements in this action incurred to be taxed by the Court in the manner provided by law.

Seward

Dated at ~~Anchorage~~, Alaska, this 30th day of June
~~April~~, 1947.

/s/ ANTHONY J. DIMOND,
District Judge.

Entered Court Journal No. G14, Page No. 382,
June 30, 1947.

[Endorsed]: Filed June 30, 1947.

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

The above-named defendants, William H. Novick and Annetta Novick, conceiving themselves aggrieved by the judgment made and entered on the 30th day of June, 1947, in the above-entitled cause, wherein and whereby judgment was rendered in favor of the Plaintiff and against said defendants in the sum of Three Thousand Five Hundred Dollars (\$3,500.00), together with plaintiff's costs and disbursements incurred in said action, do hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and said defendants pray that the appeal be allowed; that a citation may issue herein; and that a transcript of the record proceedings and papers in said cause be sent to the said Appellate Court.

Petitioners further pray that a supersedeas may be granted herein pending a final disposition of the cause upon the defendants filing a supersedeas and cost bond in such amount as may be fixed by the order allowing the appeal.

Dated September 15, 1947.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendants.

Service Admitted Sept. 15th, 1947.

.....,

Attorneys for Plaintiff. [76]

[Endorsed]: Filed Sept. 15, 1947. [77]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND
SUPERSEDEAS

The petition of William H. Novick and Annetta Novick, defendants in the above-entitled cause, for an appeal from the final judgment rendered therein, is hereby granted and the appeal is allowed, and upon the petitioners filing a bond in the sum of Four Thousand Dollars (\$4,000.00), with sufficient sureties and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered in the above cause, and shall suspend and stay all further proceedings in this Court until the termination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, September 15, 1947.

/s/ ANTHONY J. DIMOND,
District Judge.

Entered Court Journal No. G15, Page No. 111,
Sept. 15, 1947.

[Endorsed]: Filed Sept. 15, 1947. [78]

[Title of District Court and Cause.]

CITATION ON APPEAL

To the Plaintiff, Anson E. Gouldsberry, and to His Attorneys, Davis and Renfrew:

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, forty (40) days from the date of this citation, pursuant to the Order Allowing Appeal on file in the office of the Clerk of the District Court for the Territory of Alaska, Third Division, in that certain action pending in said District Court entitled Anson E. Gouldsberry, Plaintiff, vs. William H. Novick, Annetta Novick, William Carroll and Lucille Carroll, Defendants, being No. S-4337, in the files of said District Court, and wherein the said William H. Novick and Annetta Novick are appellants, and Anson E. Gouldsberry is appellee, to show cause, if any there be, why the judgment rendered against the said William H. Novick and Annetta Novick should not be corrected and why speedy justice should not be done to the parties in the premises in that behalf. [79]

Witnessed by the Honorable Anthony J. Dimond, Judge of the District Court for the Territory of Alaska, Third Division, this 15th day of September, 1947.

/s/ ANTHONY J. DIMOND,

Judge.

Service admitted September 15, 1947.

.....,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 15, 1947. [80]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now Comes the defendants and appellants herein, William H. Novick and Annetta Novick, and file the following Assignment of Errors upon which they will rely in the prosecution of their appeal to the United States Circuit Court of Appeals for The Ninth Circuit, from the final judgment made and entered in this cause on the 30th day of June, 1947, by the above-entitled Court.

I.

That the Court erred in overruling the motion of the defendants, William H. Novick and Annetta Novick, and Lucille Carroll, made after both sides had rested, that the Court direct the jury to return a verdict in favor of said defendants, said motion being based upon the ground that there was insufficient evidence to go to the jury to justify a verdict in favor of the plaintiff and against said defendants, to which ruling the defendants excepted and the exception was allowed.

II.

Error of the Court and abuse of discretion in overruling the motion for a new trial, said motion being based upon the following grounds: [81]

- (A) Said verdict resulted in part from accident or surprise which ordinary prudence could not have guarded against.

- (B) Newly discovered evidence material for the defendants, which they could not, with reasonable diligence, have discovered and produced at the trial.
- (C) That the verdict of the jury was for excessive damages appearing to have been given under the influence of passion or prejudice.
- (D) That there was an insufficiency of the evidence to justify the verdict against the defendants.

III.

That the Court erred in instructing the jury as follows:

“An employer may be liable for the acts of employees resulting in injury to another person where the employee, in committing such injury, was acting within the scope of his employment and in the line of his duties while engaged in such employment, or if the employer ratified the act of his employee causing the injury to such other person.

“If, in this case, you find from a preponderance of the evidence, that defendant William Carroll committed an unlawful assault and battery upon the plaintiff and that, in committing such assault and battery, the defendant, William Carroll, was acting within the scope of his employment and in the line of his duties while engaged in such employment, or if you find that such unlawful assault and battery was committed by defendant, William Carroll, and

that the defendants William H. Novick and Annetta Novick or either of them, ratified the act of the defendant, William Carroll, in [82] assaulting and beating the plaintiff, then the defendants, William H. Novick and Annetta Novick, may be held in damages, as follows:

* * * * *

“In this connection, you may consider and give such weight as you think proper to the testimony received in the trial of the case relative to the continued employment of defendant William Carroll by defendants William H. Novick and Annetta Novick, subsequent to July 5, 1946, the testimony of the alleged signing of criminal complaints against the plaintiff by defendants William H. Novick and Annetta Novick on or after July 5, 1946.”

IV.

That the Court erred in refusing to instruct the jury as requested by the defendants, as follows:

Defendants' Requested Instruction No. 1

The Court instructs you that the law is the master, in this case Mr. and Mrs. Novick, is not responsible for the acts of the servant, in this case William Carroll, done outside of the masters' business and to accomplish some end personal to the servant himself; that the law does not imply any authority from the master to the servant to commit an assault upon a person who is not injuring or threatening to injure the master's property, and who is not interfering with the servant's performance of his duty to the master; and if, in this case, you be-

lieve from the evidence, that the defendant William Carroll struck the plaintiff Anson E. Gouldsberry for some reason or purpose of his own, the plaintiff cannot recover in this case from the defendants William Novick and Annetta Novick, and your [83] verdict must be for the defendants William Novick and Annetta Novick; to which ruling defendants excepted and exception was allowed.

V.

That the Court erred in refusing to instruct the jury as requested by defendants as follows:

Defendants' Requested Instruction No. 2

The jury is instructed that the outcome of any altercation of an employee with others, resulting from an assault and battery precipitated by matters and things having nothing to do with the duties and employment of such employee, is not within the scope of the employment of such employee, and the employers cannot be held accountable therefor; that if the defendant William Carroll had any kind of personal quarrel with the plaintiff Gouldsberry, in or upon the premises of the defendants William Novick and Annetta Novick, and such quarrel resulted in injury or damage to the plaintiff Anson E. Gouldsberry, then the defendants William Novick and Annetta Novick cannot be held responsible, or liable therefor, unless it is shown by the evidence that the employers William Novick and Annetta Novick actually participated in the quarrel, argument or fight, or encouraged or aided the employee Carroll; to which ruling defendants excepted and exception was allowed.

VI.

That the Court erred in refusing to instruct the jury as requested by defendants, as follows:

Defendants' Requested Instruction No. 3

The jury is instructed, that if it is reasonably satisfied from the evidence on this trial that the plaintiff Anson E. [84] Gouldsberry made threats to do harm to the defendant William Carroll, and if in fact the plaintiff Anson E. Gouldsberry carried out his threats by assaulting the defendant William Carroll, who was at the time an employee of the defendants William A. Novick and Annetta Novick; and the defendant, in resisting the attack of the plaintiff Anson E. Gouldsberry, caused the plaintiff Gouldsberry any injury, then the defendant Carroll cannot be held liable therefor, and the defendants Novick, Carroll's employers, can in no manner be held responsible or liable for any injury or damage to the plaintiff Anson E. Gouldsberry; to which ruling defendants excepted and exception was allowed.

VII.

That the Court erred in refusing to instruct the jury as requested by defendants, as follows:

Defendants' Requested Instruction No. 4

The jury is instructed that the proprietor of any place of business, has the right to remove any person therefrom if such person is conducting himself in a disorderly manner; that in this case, either Mr. or Mrs. Novick, or their employee, Mr. Carroll, had the right, and it was their duty, to cause the plaintiff to be removed, by force if necessary, from

the bar or cocktail lounge, if, from the evidence, the plaintiff Gouldsberry was conducting himself in a manner not conducive to peace and good order, and if the plaintiff was making a disturbance likely to cause injury or damage to persons or property in or upon the premises of the Novicks; to which ruling defendants excepted and exception was allowed.

VIII.

That the Court erred in refusing to instruct the jury as requested by defendants, as follows:

Defendants' Requested Instruction No. 5

The jury are charged that if they shall be reasonably satisfied from the evidence that the alleged assault and battery by Carroll upon the plaintiff in the case arose out of a personal dispute between the plaintiff and the said Carroll, they must find a verdict for the defendants, notwithstanding the fact that Carroll was in the employ of the defendant Novick at the time of the alleged assault, unless they shall be reasonably satisfied that defendant authorized or participated in such act; to which ruling defendants excepted and exception was allowed.

Wherefore defendants and appellants pray that the judgment in the above-entitled cause be reversed and the cause remanded, with instructions to the trial court as to further proceedings therein and for such other and further relief as may be just in the premises. /s/ GEORGE B. GRIGSBY,

Attorney for Defendants.

Service admitted Sept. 15th, 1947.

.....,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 15, 1947. [86]

[Title of District Court and Cause.]

Minute Order

EXTENDING TIME TO DOCKET CASE IN
CIRCUIT COURT OF APPEALS

Now at this time upon motion of George B. Grigsby, counsel for defendants.

It Is Ordered that defendants, by and through their counsel, have and are hereby granted 75 days within which to docket cause No. S-4337, entitled Anson E. Gouldsberry, plaintiff, versus William H. Novick, Annetta Novick, William Carroll and Lucille Carroll, defendants, with the Circuit Court of Appeals for the Ninth Circuit.

Entered Court Journal No. G15, Page No. 111.
Sept. 15, 1947. [87]

[Title of District Court and Cause.]

Minute Order

EXTENDING TIME TO FILE AND DOCKET
CASE WITH CIRCUIT COURT OF
APPEALS

Now at this time on motion of George B. Grigsby, counsel for defendants,

It Is Ordered that the defendants in cause No. S-4337, entitled Anson E. Gouldsberry, plaintiff, versus William H. Novick, Annetta Novick, William Carroll, and Lucille Carroll, defendants, be, and they are hereby, granted additional thirty days within which to file and docket cause with Circuit Court of Appeals.

Entered Court Journal No. G15, Page No. 181,
Oct. 20, 1947. [88]

[Title of District Court and Cause.]

Minute Order

GRANTING ADDITIONAL TIME WITHIN
WHICH TO DOCKET CAUSE WITH
CIRCUIT COURT OF APPEALS

Now at this time upon motion of George B. Grigsby, of counsel for defendants,

It Is Ordered that the defendants in cause No. S-4337, entitled Anson E. Gouldsberry, plaintiff, versus William H. Novick, Annetta Novick, William Carroll and Lucille Carrol, defendants, be, and they are hereby, given 30 additional days within which to docket cause with the Circuit Court of Appeals.

Entered Court Journal No. G15, Page No. 316,
Dec. 5, 1947. [89]

[Title of District Court and Cause.]

Minute Order

EXTENDING TIME WITHIN WHICH TO
DOCKET CASE IN CIRCUIT COURT OF
APPEALS.

Now at this time upon motion of George B. Grigsby, of counsel for defendants,

It Is Ordered that extension of time to March 1, 1948, be, and it is hereby granted to defendants within which to docket cause No. A-4337, entitled Anson E. Gouldsberry, plaintiff, versus William H. Novick, Annetta Novick, William Carroll and Lucille Carroll, defendants, in Circuit Court of Appeals.

Entered Court Journal No. G 6, Page 2, Jan. 16, 1948. [90]

In the District Court for the Territory of Alaska,
Third Division

No. S-4337

ANSON E. GOULDSBERRY,

Plaintiff,

vs.

WILLIAM H. NOVICK, ANNETTA NOVICK,
WILLIAM CARROLL and LUCILLE
CARROLL,

Defendants.

BILL OF EXCEPTIONS

Be It Remembered:

The above cause came on regularly for trial on Wednesday, March 26, 1947, before the Honorable Anthony J. Dimond, Judge of the above-entitled court, at Seward, Alaska, the plaintiff appearing in person and by his attorney, E. V. Davis, the defendants appearing in person, and by their attorney, R. E. Baumgartner, and the following proceedings were had.

A jury having been duly impaneled and sworn.

ANSON E. GOULDSBERRY

the plaintiff, being first duly sworn, testified in his own behalf as follows:

Direct Examination

By Mr. Davis:

My name is Anson E. Gouldsberry. I live at Seward, Alaska, on Fourth Street. I have lived there ten years, in April. I am a longshoreman and

(Testimony of Anson E. Gouldsberry.)

do most anything I can to make an honest living. I worked in a mine for two years up at Crown Point, Mile 26. Most of the time I have been working as longshoreman. I am the plaintiff in this action. I remember the 5th day of July, 1946. On the evening of that day, I was home until about 9:30 and I had a chicken [91] and I put it on the stove and turned the fire up and came down-town to see some friends of mine and I looked around town and didn't find them. I happened to walk into Novick's Bar and there was some friends of mine in there and I offered to buy one of them a drink and he said: "No I am going home." And so I spoke to Bill Carroll and congratulated him and shook hands with him and bought him a drink and bought his wife a drink.

There was present at the time I was in there, in the bar, besides Mr. Carroll, a fellow by the name of Freckman, but he walked out shortly after; Charlie Ottoson, Charlie Peterson and Mr. and Mrs. Carroll and Mrs. Novick was the only ones I knew in there at the time.

I sat down to the bar and I said, "Give me a bottle of beer" and Mr. Carroll bought me a bottle of beer and then I congratulated him and shook hands like I should and I said, "have a drink," and he said "No, I am not drinking. I will take a coca cola." I said, "That is okay, have one." And I laid my money on the bar and he said, "Jimmie is sitting down there," which is his wife. I said "All right, give her a drink too." Jimmie was my ex-wife. I am not sure when we were divorced. I

(Testimony of Anson E. Gouldsberry.)

think it was in May, sometime. She got the divorce. I didn't know it. It was in 1946.

And so I set there to the bar and had a drink out of the bottle and I had the little dog on my lap and Charlie Ottoson came over and said, "How old is the dog?" I said: "I don't know. Jimmie remembers when they were born. She can tell you maybe." She said, "They were born in January." I said: "Well they are about six months old, then." So I sit there and didn't say anything and she said: "All these lies people tell about me is not so." I said: "Well, I don't care." And so she started to talking and she got excited and she raised her voice—loud. And so I said: "Well, I don't suppose [92] you bought another man a bathrobe and I had to pay for it." Just then a bottle hit me in the face and I got this cut and I was knocked to the floor—and I had blood in my eyes and mouth and the next thing I knew I was being dragged or throwed to the door and then Mr. Kerestine, the Chief of Police, came along and took me out of inside the door.

It was Carroll who hit me with the bottle,—Bill Carroll—from behind the bar. He jerked it out of my hand. I didn't give him any cause to hit me with that bottle that I know of. I was not making a nuisance of myself that I know of. I was acting like a gentleman when I was in there. After I was on the floor, I felt something beating on me and I twisted and turned and kicked and fought to get up and protect myself.

Q. Do you know who it was that was on you at that time?

(Testimony of Anson E. Gouldsberry.)

A. At that time? Well, I was knocked unconsciously. (Witness continues.) Mrs. Novick was there at the bar when I offered to buy her and Charlie Ottoson and Carroll a drink. Whether I did or not, I can't recollect—whether she accepted a drink or not. But I know I did buy Ottoson and Mr. and Mrs. Carroll a drink. When I come to and was near the door I know that Mrs. Novick had her hands on my shoulders shoving on me to the door. She told me to get out and shut up. I sat about four or five stools from the lower end of the bar. Mrs. Carroll was sitting at the end of the bar. Mrs. Novick was standing at the end of the bar. She was right next to Mrs. Carroll. Charlie Ottoson was sitting next to Mrs. Carroll toward the front door of the place. Mrs. Carroll was near the back end of the bar away from the entrance door of the place. I don't know whether Mr. Carroll took part of this scuffle on the floor,—after I was knocked out, I don't know. I couldn't say that he was there or who was beating on me. I did receive injuries as a result of this. I have got a cut here and my lip was cut and [93] I was all blood and had a broken ankle in my leg. And I was taken to the jail after that. Pete Kerestine, the Chief of Police, took me over and put me in jail and searched me and when I was standing there with my arms up like that, he stuck his hands in my pocket and kind of throwed me off balance, and I stepped to catch my balance and he grabbed me and jerked me and shook me and said: "Stand still when I am searching you or I will hang one on you." Naturally, any-

(Testimony of Anson E. Gouldsberry.)

one is going to be shoved off balance when they are ramming their hands in your pockets. And I was put in there—didn't have no drinking water, no sanitary conditions—blankets. I was cold and wet, and I was cold—suffered all night. I laid there bleeding all night. I was still bleeding at the time I was put in jail. Nothing at all was done to take care of my cuts. Nothing done to take care of my foot. There was nobody around there at all. I was locked up until the next morning—Saturday morning—until around ten o'clock. Mrs. Novick had a complaint against me that I had her on the floor beating her, and Mr. and Mrs. Carroll had a complaint against me, and I didn't plead guilty to them because I was not guilty of what they had me charged with. Then I went on bond—Moser came and went on my bonds and they turned me out. I got out on bail Saturday, about 11 o'clock. That was about 12 hours after I had been put in jail. When I first went in I asked to be allowed to make bail, and go home and he said: "No, everybody is in bed. You will have to stay here tonight," and he walked away and left me. I mean by "he," the Chief of Police, Mr. Kerestine.

When I was released on bail on Saturday morning, I went home. I went to the bank and got some money to go to Anchorage, on because I was not going to pay something that I didn't owe, and I asked Pete if [94] I could get extension on it until Monday morning and he said no, it was up to the Court. And I said who was the Court, and he said:

(Testimony of Anson E. Gouldsberry.)

“Go to the City Hall.” I went over and asked Mr. Howe, who was the Clerk here, for an extension of time, and he refused me. And I had 20 minutes to catch the plane to go to Anchorage, and I went home and washed the blood off my face and changed shirts and caught the plane and went to Anchorage. And it was Saturday afternoon and there was nobody open. I couldn’t get no counsel up there—only I had—I got Ellis and I paid him and he told me to go back to Seward—“everything is all right.” He said he called up down here. He said: “Go back to Seward. If there is anything,” he said “I will be down.” And then Monday morning I got back here. I was in the hospital. Dr. Bannister took X-ray of my foot, and before it was dressed Mr. Kerestine, the Chief of Police, and the City Clerk was over there and took me out of the hospital before my foot was dressed or anything. I just had a sock on my foot, and I came over on crutches. And when they—I didn’t know when I went back to the hospital that I had 75 days in jail or \$150 fine until I was being discharged out of the hospital, and I told the nurse to call the Chief of Police, that I was being discharged from the hospital, and he was over there after me before I had my clothes on. I thought he was going to take me home. Instead he took me to the fire hall and I said: “How long have I got to put in here, Pete?” He said: “75 days.” That’s the first I knew of it because when the court was dismissed he didn’t tell me I had a \$150 fine to pay for 75 days in jail. That’s the first I knew of it.

(Testimony of Anson E. Gouldsberry.)

I guess you would call it a trial that he had on Monday morning. I tried to make a defense at that time and they wouldn't let me talk. Mr. Kerestine, the Chief of Police, told me to shut up my face and not beat my gums so much so I wouldn't say nothing. [95] Mr. Novick was there on Monday morning. He didn't have anything to say regarding this case but after the case was over and just Mr. Kerestine and myself was there, he wanted to know—he said: "What's the matter with you, Gouldsberry, are you crazy? If I had been there I would have broke your God damn neck," and I started to say something and he made me shut up and I didn't say nothin. I shut up, see?

As a result of this fracas over in the bar, I did suffer injuries. I suffered a broken leg—ankle—and a cut on my face, and bruises all over my body and on my knee here. The mark is still there yet. I underwent hospitalization as a result of my injuries. An X-ray was taken. My hospital bill for the injuries received was \$35. I had a doctor bill of \$52.50. My regular employment and job at the time in question was longshoreman, and during the time in question, along in July—August, thereabouts, 1946—I earned around 750 to 800 a month. As a result of my injuries I was not able to work after this fracas. I didn't work. I didn't start to work until December to amount to anything—only little odd jobs I had to make a living—I didn't have no income to amount to anything. I had to pay out money for fine and I don't know what that was for.

(Testimony of Anson E. Gouldsberry.)

I was kept from my regular employment as a result of my injuries there. I couldn't work for at least three months. I did a little work around town and a little around home but my ankle bothered me all the time and it still bothers me. I didn't have any regular employment at all, longshoring or otherwise during the time that I was laid up with my ankle. I didn't do anything. My leg still bothers me. I was to the doctor a few days ago with it and he told me that it would bother me for quite a little while. My knee is healed over, yes. It was all skinned up. I still carry a scar on that knee. I have a scar on my face. I lost over \$2000—2500, [96] anyway—in wages alone. I have already told about my doctor and hospital bills. I did suffer pain from the effect of these injuries. At times, my leg still bothers me. I have never been in jail before—for nothing—never paid a fine. First time I was ever in jail. I was embarrassed by being put in jail. I didn't figure that being put in jail was my fault. I don't know why I should go to jail. I wasn't guilty of anything. If I would have been guilty I would have said it was my own fault and paid my fine and pled guilty. I have always made a habit of paying my bills and being honest and I still think it is the best policy. I was not in the habit of going into Novick's bar and making a nuisance of myself. I never was in there before—only to buy a package of cigarettes and go out. I was not trying to make a nuisance of myself towards the ex-Mrs. Gouldsberry or toward her then husband, William Carroll. If I had I would have contested the divorce in the first place.

(Testimony of Anson E. Gouldsberry.)

Cross-Examination

By Mr. Baumgartner:

It is not a fact that I almost contested this divorce. I have got some mining claims around the country and she said she would sign them if I would bring them down. I brought them down didn't I? The lease for the mining claims—and she said if I would give her the washing machine she would sign these claims over and I said: "Well, she has got all she will get there. We will just let it go the way it is." Didn't I come in and ask you, Mr. Baumgartner if she got the divorce and ask you for a copy and said if she don't get it I am going to Anchorage and——

The Court: Do not ask Counsel any questions. You answer questions.

(Witness continuing. Questions by Mr. Baumgartner; answers by Mr. Gouldsberry.)

Q. Now, Mr. Gouldsberry, did you get along very well with Mr. Carroll?

A. Did I get along with him?

Q. Yes?

A. As far as [97] I know, yes.

Q. You liked him?

A. I had no hate against him. I like everybody.

Q. Oh—Isn't it a fact that you threatened to kill him? A. No I did not.

(Testimony of Anson E. Gouldsberry.)

Q. Isn't it a fact that you accosted Mr. Carroll once previously on the street and threatened him?

A. Yes, I can explain that to you if you wish me to.

Q. Yes, go ahead?

A. All right—yes, I did. Show me any man in this town——

Mr. Davis: Don't argue now, Mr. Gouldsberry—just tell your story.

Mr. Gouldsberry: All right. I was coming down to go to work on the boat one evening to see if I should be there the next morning. My wife was still married to me then—wasn't divorced then. Her and Carroll was standing on the street, loving and rubbing together. I grabbed him by the collar and slapped him over. Anybody that wouldn't do that—would you do that——

The Court: Do not ask questions.

Mr. Baumgartner: Well, Mr. Gouldsberry, in spite of this you said you like everybody? You like Mr. Carroll?

A. I have nothing against anybody.

Q. Even after that? A. Yes.

Q. And you didn't ever strike him?

A. Did I ever strike him?

Q. Yes?

A. Yes, I slapped him on the street.

Q. After that? A. After that?

Q. After this incident?

A. Not that I ever know of. No sir, I didn't.

Q. Now, you say you never threatened his life?

A. That's right, I didn't.

(Testimony of Anson E. Gouldsberry.)

Q. Now, on this fifth of July when you came in here. You came in for the purpose of congratulating Mr. and Mrs. Carroll?

A. Into Novick's bar?

Q. Yes?

A. No, I figure it is a public place and I walked in there, and I was a gentleman, and looked for some friends of mine. And I think I had a perfect right to walk in there. Otherwise why shouldn't I have been told to stay out? I wasn't looking for trouble.

After I saw Mr. Carroll behind the bar I then congratulated him. I said: "How are you, Bill? Congratulations to you." And he said: "Thank you," and he reached his hand out and I shook hands with him. I first saw Jimmie—Mrs. Carroll—when he said: Jimmie is sitting at the end of the bar" and I said: "all right, [98] give her a drink." I was then sitting at the bar, 8 or 10 feet from where Mrs. Carroll was sitting. I didn't sit next to her at that time. I had moved over next to her when she said something about a wrist watch, and she said: "See?" And she told me, herself—congratulated me and said "Good luck," and I said "Good luck to you" and she said: "Thank you, I am very happy" and I said "Good." And I didn't make [99] further remarks about her to Mr. Carroll or anyone.

(Questions by Mr. Baumgartner; answers by Mr. Gouldsberry.)

(Testimony of Anson E. Gouldsberry.)

Q. And you didn't make further remarks about her to Mr. Carroll or anyone?

A. Not that I know of.

Q. But you might have?

A. No, I can say I didn't. I know what I said and done.

Q. You are positive you made no remarks?

A. No, I did not.

Q. No disrespectful remarks at all?

A. No.

Q. Then you say out of a clear sky, a bottle descended on you and knocked you unconscious.

A. I will tell you what I did say. This is not anything. But I did say that I didn't care what other people said—she told me about a lot of lies that people were telling—and I said: “well I don't care,” and I did say: “I don't suppose you bought another man a bathrobe,” and then a bottle hit me in the face.

Q. Then, you did make some other remarks then?

A. Not that I know of, no. I never made no bad remarks that I know of. If you call that a bad remark——

Q. And you say you are positive Mr. Carroll hurled this bottle at you?

A. Hit me with this bottle?

Q. Yes? A. Yes, yes.

Q. Did he throw it or——?

A. He grabbed it out of my hand and hit me in the face.

(Testimony of Anson E. Gouldsberry.)

Q. On which side of the face?

A. Right there—you can see the cut. You can see the scar.

Q. That is no indication a bottle hit you, Mr. Gouldsberry. A. It isn't:

Q. And after that you say you were knocked unconscious.

A. When that bottle hit me, I was knocked backwards off the stool on the floor on my back.

Q. Now, you testified you knew nothing else until you were dragged to the door and Mrs. Novick herself pushed you.

A. Until I got to the door and that's when she had ahold of me pushing me to put me out the door.

Q. All the interval between the time you were knocked unconscious and you were pushed to the door, you don't remember anything else?

A. Except the blood running in my face, and I twisted and turned to get up, yes.

Q. In your unconscious state, you remember that?

A. I didn't know exactly everything going on, but I do know that. I had blood in my eye and in my mouth and all over me. I do know that.

Q. And you know that while you were unconscious?

A. Well, naturally, you [100] wouldn't know exactly everything going on but you would know that. You would feel that.

Q. Mr. Gouldsberry, answer: Were you unconscious from the time this bottle struck you until you were up at the door being assisted out?

A. Partly unconscious yes.

(Testimony of Anson E. Gouldsberry.)

Q. Oh, partly, now—not entirely? A. No.

Q. Do you recall striking your wife—your ex-wife—at that time?

A. No, I do not. I might have—when I was laying on the floor and kicking to get up, I might have accidentally kicked her.

Q. You might have?

A. I might have accidental, but I never hit her purposely—I will say that. I never have.

Q. Well, Mr. Gouldsberry, did Mrs. Novick strike you?

A. I can't say that she struck me, no.

Q. But in your complaint, Mr. Gouldsberry, you allege that she struck and beat you about the body?

A. They had me on the floor beating on me.

Q. Oh, now she did?

A. Hammering on me—I don't say personally that she did it or who did it. But they had me on the floor beating on me.

Q. Well now, did she beat you or didn't she? Mr. Gouldsberry stick to your story.

A. I didn't say she did or didn't beat me. I said I was partly knocked unconscious, and I can't say she did or didn't beat me.

Q. Well, you couldn't say then, that she did could you?

A. I know she was pushing me pushing me to the door to put me out.

Q. Is that beating you?

A. No. Did I say she beat me?

(Testimony of Anson E. Gouldsberry.)

Q. Yes, Mr. Gouldsberry, you did. Now state to the jury whether she beat you or whether she didn't. Answer the question: Did Mrs. Novick beat you?

A. As I say I can't say that she did or didn't.

Q. You don't know, then?

A. I don't know exactly, no.

Q. And you don't know much exactly whoever else beat you while you were partially unconscious?

A. I don't. Well, I don't suppose anybody beat me, then—huh?

Q. I am not answering your questions, Mr. Gouldsberry. You don't seem to know what happened to you while you were partially unconscious, do you?

A. Yes, I do. I know I got a severe beating.

Q. That is all you know? You don't know whether by Dick Smith or Henry Jones, do you?

A. Well, I don't think they was in there that night.

Q. Did Mr. Novick beat you?

A. No, he did not.

Q. Who advised you to make him a defendant in this case?

A. Who advised me?

A. Yes? A. Myself.

Q. Yourself advised you to make him a defendant in this case? Did you ever write any threatening letters to Mr. Carroll prior to this?

A. No, I never threatened anybody.

Q. Did you ever write any letters to Mr. Carroll at all complaining about your ex-wife, Mrs. Carroll?

A. Did I?

(Testimony of Anson E. Gouldsberry.)

Q. Yes? Produce it.

Q. I say, did you ever write any letters to anyone?

A. I will admit that, that I did in one way, because she threatened—and I got witnesses—she threatened to burn the home down out there where I live. So I did it, but I didn't threaten nobody.

Q. Mr. Gouldsberry, did you write any disrespectful letters, no. [102]

Q. Did you, *way* within a month or so—or say, during the time you and Mrs. Carroll were divorced, write any letters to her mother or to any other person complaining of her conduct or complaining of Mr. Carroll's reputation?

A. Answer "yes" or "no"?

Mr. Davis: Your Honor, that question is incompetent, irrelevant and immaterial—outside the *scope* of the issues of this case.

The Court: Objection is overruled. You may answer. [103]

Yes, I wrote her a letter. I wish to explain why I wrote the letter. I will answer that question. I got a letter too—and several of them. I wrote the letter complaining of the reputation because I have a letter that she wrote that I wouldn't support her or take her nowhere and I beat her up all the time, and I wrote to her mother to explain that I was no rat like she wrote in the letter to her mother, and claimed that I was. I did it to keep myself clear, that's all—to clear myself.

(Testimony of Anson E. Gouldsberry.)

(Questions by Mr. Baumgartner; answers by Mr. Gouldsberry.)

Q. And you explained to her mother who was the rat in the picture? A. No, I did not.

Q. You didn't mention her?

A. Sure, I mentioned her name, but I never said nothing bad against her.

Q. Did you mention Bill Carroll?

A. Did I? I sent her the clippings out of the paper about the marriage.

I didn't write to anyone immediately before the 5th of July—her mother or anyone else—stating to the effect that Bill Carroll was no good. I did not. I didn't say he was no good. I had a letter too, out there, and I wrote and told her what I did and what kind of a person that I was and if she didn't believe it she could find out from someone else.

After I was struck or someone struck me or a bottle was thrown at me, I was knocked backwards off the stool when the bottle hit me, knocked to the floor and injured my back and my vertebrae in my back. I was partly knocked out yes, until I started to feel something beating on me and blood running in my eyes, and I have got my shirt with the blood on it yet. When I fought to get up, yes, I fought to get up and anybody would fight too, for self-protection, and yes, I know there was three or four around me and one of them was the fellow that used to work in the second hand store down there—I don't know what his name was—big, heavy-set fel-

(Testimony of Anson E. Gouldsberry.)

low, he had ahold of me. I know who was beating me when I came partly to and was being taken to the door but when I was laying on the floor, as [104] I say, I don't know who was beating on me. Mrs. Novick had ahold of me. Nobody was striking me when they were taking me to the door. Yes, somebody was striking me when I was on the floor, when I become partly conscious.

Q. Who, Mr. Gouldsberry?

A. Mrs. Novick and Mrs. Carroll and the fellow who worked in the second hand store.

Q. They were striking you and beating you?

A. Yes, stomping on me and kicking me—I don't know what they were hitting me with.

Q. You remember that definitely now?

A. Yes, when I come to, when I was knocked out on the floor and I felt something beating on me and I seen who was around me—I did see them, yes. There was blood in my eyes. I couldn't see very well. I could see well enough to see that.

Redirect Examination

By Mr. Davis:

I didn't in this letter I wrote to Mrs. Carroll's mother, make any threats against Mr. Carroll. I never made any threats against him. I didn't go into Novick's bar that night looking for trouble with Mr. Carroll. I certainly wouldn't have took a little dog I think the world and all of in there with me. If I was looking for trouble I would have left my dog at home; or I wouldn't have put my supper on

(Testimony of Anson E. Gouldsberry.)

and turned the stove up and went away and left the fire in the house. I have never looked for trouble in this town or any town. I couldn't say who this second hand store man was employed by. I had seen him around the second hand store. I heard he was employed by Mr. Novick as a swamper in Novick's place. He was there at that time. There were 3 or 4 others around there at that time, that was Carroll, Mrs. Carroll, Mrs. Novick and the fellow in the second hand store. They was all around me when I was on the floor. [105]

And thereupon,

HENRY J. PALLAGE

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Davis:

My name is Henry J. Pallage. I live in Seward. Have lived in Seward close to 3 years. I know Mr. Gouldsberry, the plaintiff. I went down to the city jail on or about the 5th day of July, 1946, to see him—went down to pay his fine. I noticed his condition when I was there. He looked pretty bad. He had a very bad cut just on the side of his left eye, and his eye was black, and he was black and blue across there, and he had blue spots here and there, and he showed me his arm; and I noticed him limping around on one foot and I asked him what the trouble was, and he showed me his ankle was swelled

(Testimony of Henry J. Pallage.)

up and black and blue. He was in a little cell just off the side of the fire truck. The place looked pretty bad. It was not clean. It looked just terrible. It certainly did smell—very bad. I mentioned about the place smelling bad. I said: “It’s a pretty tough place for a fellow to be.” And I said I came down to pay his fine and I had been informed just a little while before he was in jail. I didn’t know about it until one of the longshoremen stopped and told me at my house, so I went right down to pay the fine. I seen something on the floor that certainly looked like blood, yes, and on the side of the sort of bunk like that was there—looked like quite a bit of blood there. I don’t know where the blood came from there. I seen Mr. Gouldsberry’s clothes—his shirt and his tie down to his house. I didn’t notice them in the jail.

And thereupon, the plaintiff rested his case and

JOSEPH M. HAMILTON

being first duly sworn, testified for and in behalf of the defendants as follows: [106]

Direct Examination

By Mr. Baumgartner:

My name is Joseph M. Hamilton. I have lived in Seward between 5 and 6 years. I know the plaintiff, in this case, Mr. Anson E. Gouldsberry. Have known him a little over a year or a year and a half. I recall this matter happening in the bar. I talked to Mr. Gouldsberry a month—I believe it was a month pre-

(Testimony of Joseph M. Hamilton.)

vious to that when I was working for Mr. Friede. Mr. Friede's place of business was right across the street from where Mr. Gouldsberry lives. At that time, Mr. Gouldsberry made a statement to me in regard to Mr. Carroll. He made many threats about what he was going to do. I don't recall any words that he used. I didn't pay much attention. I know he made a lot of statements about Mr. Carroll and his wife, Jimmie. He made threats about going to get the marshal to arrest Jimmie on some charges, and he said: "Better yet, I think I will do it myself." He made quite a few threats of injury. The one I just mentioned is one. I wouldn't say that he threatened to kill Mr. Carroll but he did make quite a few drastic statements. I would gather from those statements that he made some time prior to the 5th of July that Mr. Gouldsberry had intended to do harm to Mr. Carroll.

Cross-Examination

By Mr. Davis:

I have lived in Seward between 5 and 6 years. I have known Mr. Gouldsberry about a year and a half. That would put it back, somewhere the first of the year, 1946, or maybe just a little earlier, somewhere in there. I met Mr. Gouldsberry—where I got to know him quite well was at Friede's garage when I worked on his car. In fact, I replaced the valves in his car and re-seated the valves and guided him through his whole engine. I mean Mr. Gouldsberry's. I was working for Friede and worked on his car and helped guide him. It was on valve work

(Testimony of Joseph M. Hamilton.)

and he didn't have the equipment, and I did the valve work for it. The time this happened was shortly after their divorce, [107] I believe, and when he was making the statements. It could not have been before the divorce, it was after the divorce. Well, I don't know whether it was before or after the divorce. It was during the time I worked at Friede's garage. It was in June. I worked for Friede, I believe, three months—June, July and—June, July, and August, I believe. I have heard conversations on both sides about this altercation or trouble that Mr. Gouldsberry was in with Mr. Carroll and didn't pay too much attention to it. Mr. Gouldsberry's conversation was something to the effect that he thought he would get the marshal after Mrs. Gouldsberry, or better yet, do it himself. And from that, I gathered that he was talking about bodily harm against Mr. Carroll.

Redirect Examination

By Mr. Baumgartner:

Mr. Gouldsberry did definitely threaten to do injury to Mr. Carroll. One statement was—let's see—he came in raving one morning and Mr. Friede, I believe, had been out the night before and he told Mr. Gouldsberry to take his troubles home with him, we had heard enough of him. We had been pestered, I believe, about two weeks. He did this repeatedly.

Recross-Examination

By Mr. Davis:

(Answer by Joseph M. Hamilton.)

I don't know whether this conversation was before or after the divorce——

And thereupon,

PATRICK J. FRIEDE

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is Patrick J. Friede. I have been a resident of Seward [108] going on five years. I have a garage and cab business here in Seward. My garage is located on the alley between 3rd and 4th streets. I know the plaintiff in this case, Mr. Anson E. Gouldsberry, very well. He lives right across the street from where my garage business is located. He is a neighbor of mine. Mr. Gouldsberry has been over in the garage several different times, not only prior to the 5th of July, 1946, but after the 5th. He was over there 2 or 3 different times during the month of July. I couldn't say exactly what day it was on, but he mentioned about his wife and about Bill Carroll and I just—well, in fact, he last time he talked about it I got tired of listening to it and I told him the best thing for him to do was forget about it or he was going to get himself in trouble. I don't know about his threat to do injury to Mr. Carroll. He was awfully mad and said he was going to have him arrested—oh, then he said that he should go up and kick hell out of Bill Carroll or kill him. This was along in June some time. I don't know exactly what day it was. My mechanic, Mr. Hamilton, was present during this conversation.

(Testimony of Patrick J. Friede.)

This was said to me by Mr. Gouldsberry in the presence of Max Hamilton. We were standing at the end of the bench and Max was working, doing something, and whatever he had he had in a vise, and I just—oh, I had walked away from Mr. Gouldsberry and then come back, and finally I threw up my hands and said: “The best thing for you to do is to forget about it or you are going to get yourself in trouble.” This was some time in June—I don’t know what day it was.

Cross-Examination

By Mr. Davis:

Q. Mr. Friede, you say that he talked to you both before and after the fifth of July, and that the last time you told him to forget it, go on home, or he might get in trouble?

A. I didn’t say he talked to me. I said he had been in the garage before and after the fifth of July.

As far as his conversations with me prior to the fifth of July, they were all in regards to his wife and Mr. Carroll. He said something about he was going to have him [109] arrested and he ought to go up and kick hell out of him and ought to kill him. I don’t know whether he said he was going to in those plain words or not. The way I figure he was mad because his wife left him, I guess. I don’t know whether these conversations was before or after the divorce between Mr. and Mrs. Gouldsberry because I don’t know when she received her divorce. I am not employed by Mr. Novick now and have not been

(Testimony of Patrick J. Friede.)

in the past. He never had one thing to do with my business at all. I have never worked for him. I believe Mr. Hamilton worked for him for a few weeks as bartender. I have been convicted of a crime—larceny. That was practically a year ago.

And thereupon,

CHARLES OTTOSON

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is Charles Ottoson. I have been a resident of Seward off and on since 1923. I am acquainted with Mr. Novick. I remembered being in Mr. Novick's place when there was a quarrel—I don't remember the day. I remember being there when Mr. Gouldsberry and Mrs. Carroll and Bill Carroll were there and there was an altercation of some kind. I was sitting at the back end of the bar alongside of Mrs. Carroll. I was there for some time. I don't know what time I was there either. I was there when something happened. I was sitting alongside Mrs. Carroll and after a while Ans came in—or Ansel—we call him Ans for short, that is, Mr. Gouldsberry, and he had a beer on the other end of the bar—something to drink, I wouldn't know for sure what was in the glass. He was sitting there for a while, then he moved seats so he could get up to us at last, and he had a pup with him. And he

(Testimony of Charles Ottoson.)

was sitting alongside of us and he [110] commenced talking nice, and he spoke to them people. He said: "Let by gones be bygoness and let's have a drink." But somehow or other that didn't last long. That conversation took a different color and I would say he used some abusive language, to Mrs. Carroll. He didn't use any language to me at all, because when this rough conversation come up I said: "This is no place for me," so I moved away. The rough conversation started with an argument. Mr. Gouldsberry was arguing with his wife or Bill probably. Will was behind the bar at the time—Bill Carroll. I daresay Mr. Gouldsberry was arguing with both Mrs. Carroll—but that's the time I left, when I heard this rough conversation come up. So I went to the other end of the bar then and I didn't hear much. I heard some of the rough conversation. I can't replace word for word because it was a long time ago it happened and I can't think of any word to describe that was used, but there was a rough conversation and there was a good many words in the rough conversation—I mean it was bad, or vile—slander and—I guess there was some names called, but I don't remember what name. It was bad names, I remember, and I left because I say this is no place for me. That's the reason I left. I don't like to listen to that kind of talk. I think Mr. Gouldsberry started using this bad language. For the start he was sitting alongside of me and I was sitting in between him and Mrs. Carroll, but then after a while he raised up and he was standing behind Mrs. Car-

(Testimony of Charles Ottoson.)

roll, and that was when he started to use bad language. Mr. Carroll was behind the bar. He naturally would hear this bad language. I don't know whether some of the conversation was addressed to Mr. Carroll because I went to the other end of the bar and I thought to myself, well, I will get out of this. I don't remember anything at all that Mr. Gouldsberry might have called Mr. Carroll or Mrs. Carroll—any name at all. All I remember is that Mr. Gouldsberry started the argument and then [111] I left. I stayed in the place partly—partly I went out to see Bill come in or somebody. I saw a fight in there that evening. I seen them on the floor there. I don't know how it happened that he got—they got on the floor. Gouldsberry was on the floor and there was two or three more around him and I remember Mrs. Novick was there. I looked over there once and Mrs. Novick had ahold of his arm and tried to get him up on his feet. She didn't strike him. She tried to get him up on his feet. I don't remember whether Mrs. Novick was in the place at first—I don't think she was. As near as I can remember, no. I don't recall how Mr. Gouldsberry got on the floor. I guess that's the time, probably, when I had my back turned. I didn't see anyone else on the floor. Mrs. Carroll could have been on the floor, too, because they were all around the floor there and I didn't take particular notice. I wouldn't say whether or not Mrs. Carroll was on the floor in an unconscious condition. I really don't know because there were about four of them there or five. The fellow—

(Testimony of Charles Ottoson.)

swamper was there—and they were all in the mixup, so it's pretty hard to tell really what happened. I didn't see them striking or beating Mr. Gouldsberry—I don't remember—really know what they were doing. It looked to me like if they left him alone he would have got up some way or other, and he was kicking and I don't know what it was—it was a mix-up, anyway.

Q. Mr. Gouldsberry was kicking?

A. Well, they were laying on the floor, yes. Mr. Novick was not there at the time. I don't think Mrs. Novick was there in the beginning of this. She came in afterwards. When I looked over there I seen she had ahold of his arm and it looked like she tried to help him up off the floor—not when he was going out, but when he was laying on the floor there. I don't recall whether or not Mrs. Novick said anything to Ans. I didn't hear her say anything because I was standing on the other end of the bar and you couldn't hear from there. I wasn't taking any notice and [112] you couldn't hear from there. I wasn't taking any notice, and you couldn't hear anything anyway, and sometimes I went out on the street and come back again. So I didn't hear anything. I wasn't in there when Mr. Gouldsberry left. I had left before that. I don't remember what happened afterwards.

Cross-Examination

By Mr. Davis:

I was sitting near the end of the bar, Mr. Gouldsberry was on one side of me and Mrs. Carroll was

(Testimony of Charles Ottoson.)

on the other, and I heard some rough language. In the beginning, there it was Gouldsberry that had the floor then, but what happened after that—no doubt there was plenty of loud speaking. I didn't tell you after that I couldn't hear any rough language. There was some rough language. I mean that there was rough language but I don't know what was said. I can't recall the words. Gouldsberry started the rough language. I don't remember what he said at all. I didn't hear anything said about buying a bathrobe for some man and having it charged to Mr. Gouldsberry. To begin with, the conversation was: "Let bygones be bygones." The dog that Mr. Gouldsberry was carrying was mentioned a little bit. There was a pup, and whether it was me or somebody else that asked the age of that dog, and Mrs. Carroll remembered the age of the dog. In fact, I had the dog on my lap for a while myself. When this rough language started I left. I went up to the end of the bar for awhile and was talking to somebody there too, and then I went outside—or looked out through the door—and then I come back again. I didn't see anybody strike anybody. I didn't see no blows passed, but when I came back in there and looked there was a tangle of four or five on the floor and Gouldsberry was one of them. The others were the two ladies and Bill Carroll and—I don't know his name, they call him Tiny—the fellow who was swamper there. By the two ladies, I mean Mrs. Novick and Mrs. Carroll. They wasn't all on the [113] floor but they was around there. I didn't

(Testimony of Charles Ottoson.)

see Mrs. Novick come in. I can't recollect Mrs. Novick was there to begin with. I recall she was there later on. I didn't see that she struck any blows. I know when I saw her she seemed to be trying to help him up. I feel that he probably could have gotten up if the others had let him alone. I didn't see they tried to hamper him much either way. No, he didn't get up—when I looked for the time being he didn't. I was there when the police came. I went in there once when he was already there, and I went out again. I seen them. I didn't see them take Mr. Gouldsberry away. Mr. Gouldsberry was in the saloon when the police came. He was not sitting on the stool. When the police come, I was in there—or I mean I seen the police there, and Mr. Gouldsberry—it seems to me like he was still on the floor at the time the police came. I wouldn't be sure about that though. I didn't see the police take him away.

Redirect Examination

By Mr. Baumgartner:

I am not a frequent visitor of Novick's bar. This year I think I have been in there two or three times, or four times—something like that. I don't know who takes care of the liquor store which is adjacent to the bar proper. There is a sign there, "See the bartender" or something.

And thereupon,

CHARLIE C. PETERSON

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My names is Charlie C. Peterson. I have lived in Seward 21 years. I know the Novicks and Mr. Gouldsberry. I recall of their being a little altercation in Novick's place in which Mr. Gouldsberry and Mr. Carroll were involved. I was not present at that time. I was there immediately afterwards. I was there after the fight started. Mr. Gouldsberry was still there when I arrived. I don't recall in what manner he left Novick's place. When the fight started, we left right away. I started down the street—first went up to the Northern and then I started back down the street. I started up the street to the Northern and made a phone call and came back down and went on by. That phone call had something to do in connection with this business. I called the police. I didn't get him on the phone. I saw him afterwards, Pete Kerestine. I wasn't in there after he arrived. I then went down to the Palace, stopped in to have a drink—finish the drink—we didn't finish that one. I saw Mr. Novick at the Palace. I spoke to him about this affair at his place. I asked him if he knew there was trouble up in his bar and he says: "no" and he left. I told him there was a fight, that's all. I

(Testimony of Charlie C. Peterson.)

knew who had been in the fight—it was Gouldsberry and Mr. Carroll. I don't know anything at all about the fight or how it started. After I told Mr. Novick there had been a fight in his place, he left the Palace bar and went out. I believe the police had already arrived by the time Mr. Novick got there.

Cross-Examination

By Mr. Davis:

Q. Were you there, Mr. Peterson, when this fight started? A. No.

Q. Do you know who took part in the fight that was there? Did you see any of the fight at all?

A. I saw them fighting, but I didn't pay any attention.

I believe it was Bill and Mr. Gouldsberry doing the fighting. There were other parties involved—a big fellow that was working there. I don't know his name. He said he was swamping out. Mrs. Carroll wasn't in the fight but she was there. When I looked around I didn't see her at all, in the fight. I believe she was standing up. [115] Mr. Gouldsberry was on the floor when I left there. I didn't see the fight start. I remember a conversation I had a week or so ago with Mr. Metcalf. I don't remember telling him it wasn't Mr. Gouldsberry's fault, but—I [116] don't remember what I did tell Mr. Metcalf. I think he questioned me about it—if I was there when the fight started and if I knew how it started and who started it. I told him I was there but I thought they was fighting when we come in, but I guess it started after I came in. I

(Testimony of Charlie C. Peterson.)

didn't see the start of it. I was in and out. I went to call the police and didn't get the police and then met Pete on the street. But I didn't stop in again after I left there. I was not back in Novick's at all after I left there. I don't know that the police were there by the time Novick got back. I know I talked to Pete. I know I talked to Bill and that's really all I know about this.

And thereupon,

PETER P. KERESTINE

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is Peter P. Kerestine. I have been a resident of Seward since August 25, when I got out of the service—about August 25th up until December. I had lived here prior to—I was with the Military Police. On the 5th of July, 1946, I was working as Chief of Police for the city of Seward. I was called to Novick's bar on the evening of July the 5th. I had a date but I met Mr. Charlie Peterson as I was going through the alley and he told me there was a fight at Novick's bar. I proceeded immediately to go to Novick's bar. As I arrived, there, I seen Mr. Gouldsberry—he was on the outside of the door—and this here fellow by the name of Gilbert was blocking the doorway so

(Testimony of Peter P. Kerestine.)

he couldn't get back in; and I placed Mr. Gouldsberry under arrest and took him towards the police car, and he kept on yelling, and a fellow by the name of George Jones—he is Outside at the present time—I believe he helped me to get Mr. Gouldsberry in the police car. Mr. Gouldsberry was resisting my efforts to put him in the police car. As to his physical condition—well, at that time, he seemed to be pretty [117] capable of handling himself. He was on his feet—he was walking. I had a time getting him in the car; he was giving me so much resistance. The man by the name of Gilbert was blocking the door so he couldn't get back in the bar-room. Mr. Novick I believe, was standing in back of Gilbert. I didn't notice so much at the time until—I wanted to get him in the car to get him off the street. He was walking all right at that time.

Cross-Examination

By Mr. Davis:

I didn't see the fight at all. When I got there, Gilbert was blocking the doorway and he was standing on the outside trying to get in. I had my car right in front of the place down there at Novick's Cocktail Lounge, as they call it—that would be 30 or 40 feet from that door into my car, in order to walk around. The car was parked as I come down through the alley going up the alley. The door you had to go into was on the reverse side—on the other side of the car. I was parked on the same side of

(Testimony of Peter P. Kerestine.)

the street as Novick's. My car faced North. I took him around the car and put him in the opposite side of the car. This was the front door of Novick's I am talking about. I think Mr. and Mrs. Novick and also Mr. and Mrs. Carroll signed the complaints against Mr. Gouldsberry. I signed one on him causing disturbance.

Redirect Examination

By Mr. Baumgartner:

When we was in the Military Police we was in and out of Novick's Cocktail Lounge practically every hour, patrolling the beat. I don't recall any disturbance in there during that time.

Recross-Examination

By Mr. Davis:

There must have been some kind of disturbance in there this one time because they had him on the outside of the door. I don't [118] know what went on on the inside because I wasn't there.

And thereupon,

MRS. ANNETTA NOVICK

being duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is Annetta Novick. I am the wife of William H. Novick. We have lived in Seward since

(Testimony of Mrs. Annetta Novick.)

1941. We were, on the 5th of July, proprietors of Novick's Cocktail Bar and Liquor Store. I recall what I saw there some time in the evening or night of July 5th. I was not in there when Mr. Gouldsberry came in. I was in the liquor store. That is where I am regularly stationed—in the liquor store. That is a separate and distinct place of business from the Cocktail Bar. I went into the liquor store to get a glass of water and I walked down to the end of the bar where they were sitting and, in fact, I didn't even know Mr. Gouldsberry when I seen him. Jimmie told me that he was in there. By "Jimmie," I mean Mrs. Carroll. And I got my glass of water and I spoke to all of them and everything seemed to be all right. I walked back in the liquor store and sit down and started to read, and I heard a racket and I dashed in there. Bill wasn't there, so I dashed in to see what it was all about, and they were all on the floor. Mr. Gouldsberry and Bill, and Jimmie was out—she was unconscious when I came in. I tried to move her over so she wouldn't get hurt, but I wasn't able to do it; and I tried to get them separated and the porter was helping me to try to separate them. The man mentioned as Tiny and also as Gilbert was the porter. I didn't participate in this quarrel in any way whatsoever except to try and separate them and get Mr. Gouldsberry out of the place. They were in such a tangle I couldn't see just exactly what position Mr. Carroll or Mr. Gouldsberry were in. They were both conscious. They were actively engaged in a fight. I didn't at

(Testimony of Mrs. Annetta Novick.)

any [119] time strike Mr. Gouldsberry. I was trying to separate them—to get them separated and I wanted to get him out of the place. I tried to talk to them but they naturally didn't hear me I guess. They paid no attention, of course. I kept asking people—somebody to please call Pete or to call Bill, find Bill. I wanted some help to get them separated. Nobody helped me except Gilbert, the porter. He was trying to help me to separate them. Gilbert didn't strike either of them. Gilbert and I got them separated and we started to push Mr. Gouldsberry toward the front door, and it took all of our strength to do that because he was fighting back all the way and calling very bad names back all the time. Then when we got him to the door he grabbed the door jam and hung on and Gilbert had to pry his hands loose to get him out. And we just got him outside the door when Mr. Kerestine came along and picked him up. He didn't strike me. He was trying to push back all the time—to get back to Bill Carroll to continue the fight. And he was calling names all the time that we were trying to push him back to the door. He was calling the names to Bill. Mrs. Carroll had come to, then. She came to once and she was trying to help us separate them. I don't know just how long she was unconscious but I know she was when I went in there. She was unconscious because I tried to move her and I wasn't able to. The names I say that Mr. Gouldsberry was calling back to Bill were very bad names and he still wanted to go back and have further fight with Bill.

(Testimony of Mrs. Annetta Novick.)

Cross-Examination

By Mr. Davis:

It was five or ten minutes I would say from the time I got my drink of water and went back in the liquor store until I went back in the bar. I couldn't say exactly how long it was between the time when I found Mrs. Carroll unconscious and tried to turn her over and the time she was up trying to help separate the other parties. I was pretty busy trying to separate them—I couldn't say exactly. [120] I wouldn't say exactly nor about how long, nor whether it was a very lengthy period of time. She certainly looked unconscious. She wasn't able to move. She didn't move. I don't know whether she was able to or not. I tried to pull her out of the way and couldn't, and she didn't seem able to move herself. I couldn't say how long she was unconscious. I don't think it was very long. The swamper was trying to separate them.

Q. Tell the jury how you arrived at the fact he was trying to separate them?

A. Well, that is all I can say. He was trying to get them separated and stop the fight. I certainly didn't see him get in any punches. I was not in there at the start of it—no. When I got in there they were on the floor as I said. It seems to me that both Gouldsberry and Carroll were on the bottom at different times, first one and then the other. And Gilbert and I was trying to separate them and we finally got them separated and I told Bill to get

(Testimony of Mrs. Annetta Novick.)

behind the bar, which he did, and we got Mr. Gouldsberry going toward the front of the door—the front door. I don't remember how long Mr. Carroll worked for me after this. I couldn't say because I don't remember. He didn't quit the next day. I don't remember whether he quit the next week or not. I can't tell you because I don't know. As far as I know, there were quite a few strangers in the place and I couldn't expect them to mix up in it. The parties on the floor were too interested in what they were doing to pay any attention to what I was saying as far as I know.

Redirect Examination

By Mr. Baumgartner:

I knew that she (Mrs. Gouldsberry) was getting a divorce, and he came in the liquor store one night and asked—wanted his alarm clock, and she had just come in there and so she left right away and he went right out after her. I didn't see anything or know anything personally myself, of any actual existing grievance between them. [121]

And thereupon

MRS. LUCILLE CARROLL

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is Lucille Carroll. I have been in the Territory of Alaska a little over five years and have

(Testimony of Mrs. Lucille Carroll.)

lived in Seward most of that time. At one time, I was the wife of the plaintiff, Mr. Gouldsberry. We was married five years the 19th of March last year. I divorced him the 27th day of May, 1946. I married Mr. Carroll June 1, 1946. I was present the night of this altercation on the fifth of July, 1946. I was sitting at the end of the bar talking to Mr. Ottoson. I forget exactly just what he and I were talking about, but it was all friendly because Mr. Ottoson and I have always been friends, for I have long-shored in Seward myself—driven jitney on the dock. And the first I knew of Mr. Gouldsberry being in there was when Mr. Carroll came down to the end of the bar and says: “Mr. Gouldsberry is in here and would like to buy you a drink. Is that all right?” And I said: “Yes, if he feels friendly that way.” I really want it that way, because I want to be friends with everyone. Then he come down and congratulated me and I thought everything was O.K. Then he proceeded to tell me that he loved me. My husband was tending bar at that time and he proceeded to tell me he loved me and he asked me: “Do you think that thing behind the bar loves you?” And I told him, I says: “Mr. Gouldsberry”—rather, I called him Anson—“My and your life is all over and finished and I wish you all the happiness in the world.” Then he proceeded to call me several different names. I don’t like to repeat such names. Well, he called Mr. Carroll a pimp and said he was pimping for some wenches on the line, and I had been with practically every man in Seward,

(Testimony of Mrs. Lucille Carroll.)

and then he called me a [122] dirty bitch slut whore. And I says: "I beg your pardon?" Well the next thing I knew there was bottles flying and Mr. Gouldsberry threw a bottle that put out a light at the end of the bar, and I got in—then the next thing I knew Ans had a bottle in his hand and it went back in his face. Bill knocked it back in his face and I got between them, and as far as Mr. Gouldsberry starting to hit me, he didn't. He started to hit Mr. Carroll and I stepped between them and I got hit on the nose. That was accidentally. Then when I got kicked out—I don't think I was out very long—and when I was kicked out that wasn't for me either. I just stepped between them because I didn't want any fight over me. I had had enough trouble as it was. Mrs. Novick wasn't present when the fight started. After—I just don't know exactly when she came in, but I think it was after I had got up and was on my feet, I don't know. She was trying to help me up and I felt like I was actually floored because I had accidentally got kicked in the stomach. Well, they finally got Bill and they started to the back with him, and then Mr. Gouldsberry—I said—I put my hands on his shoulder like this. I says: "Ans, please leave. Haven't you caused me enough trouble?" And then he jerked away and he started to throw a bottle. And as they was leaving, Mr. Carroll and Tiny and Mrs. Novick were taking Mr. Carroll into the bar—not into the bar, but into the office around the end of the bar.

(Testimony of Mrs. Lucille Carroll.)

Q. At the rear of the bar? Were they trying to separate or were they trying to participate in the fight?

A. They was trying to separate, and so was I because I had had enough trouble without asking for more. I didn't want any trouble. I never have. I did not at any time see Mrs. Novick lay her hands on Mr. Gouldsberry. The only thing that she did, she asked Mr. Gouldsberry to leave and she did put her hand—she said: "Mr. Gouldsberry" or "Ans," I don't—forget exactly which she called him—"please leave." [123] And he said to her: "Yes, Mrs. Novick." Pete Kerestine didn't come into the bar and get Mr. Gouldsberry out. Mr. Gouldsberry was out on the sidewalk raising Cain to get back in there. I imagine he wanted to get back in there and get into another scrap. I would say that Mr. Gouldsberry started this fight in the first place. He used the bad names. And I said, "I beg your pardon?" because I wanted no trouble, and I still want no trouble.

Q. Do you know who struck the first blow?

A. Well, the bottle—Mr. Gouldsberry threw the bottle, and the next one was to be thrown was knocked back into his face. Now, I don't know how you would call which was which because one got in the other would have. Mr. Gouldsberry threw the first bottle and then when he was holding another bottle ready to throw it, it was pushed against his face. Mr. Carroll had started around the bar. Mr. Carroll is very active and very fast on his feet,

(Testimony of Mrs. Lucille Carroll.)

and he is really a little faster than I even thought. This thing happened quite suddenly. The first thing I knew I had been out but Mr. Gouldsberry didn't mean to hit me, I don't think, in the whole thing. I was just trying to get between to separate them because I wanted no fight. I was struck in the face and the nose by a blow that was aimed at Mr. Carroll by Mr. Gouldsberry. It caused my nose to bleed. It was an accident as far as him aiming at me. I just stepped between and took it. I didn't want anyone of them to hit each other. I didn't strike either one of them because all I wanted was peace. I never saw Tiny the swamper strike him. He tried to separate them. The only person that I know of—I was present all the time—that actually struck Mr. Gouldsberry was Mr. Carroll. Mr. Gouldsberry definitely did start it.

Cross-Examination

By Mr. Davis:

I am the same Mrs. Carroll that was in court yesterday to secure [124] a divorce. I remember testifying here at that time, and that Mr. Carroll is a drunkard. He does have a vile temper when he is drinking. Otherwise when he is sober he is a very gentle fellow. When he is drinking he has a vile temper—the worst I have ever seen. Mr. Gouldsberry started this fight. When he came down there he started calling me names and he started calling Mr. Carroll names and he said that Mr. Carroll was pimping for a couple of nigger wenches on the line.

(Testimony of Mrs. Lucille Carroll.)

And he said "Do you think that pimp bastard behind the bar loves you?" And I says: "I do," which I found out that the only thing that Mr. Carroll does love is his whiskey. After this fight started, I did everything I could to break it up. I didn't want to see either one of them hurt. I have never felt ill towards Mr. Gouldsberry at any one time. I lived with Mr. Gouldsberry for five years. While we had our disagreements we got along reasonably well. He, I will say, was a very good provider. I know the couple of blows I caught—one in the face and one in the stomach, was aimed for somebody other than me. I know they was aimed for Mr. Carroll. Mr. Gouldsberry sent both of these blows, because I stepped between them. Mr. Carroll does wear glasses and he can't see very well without them. In fact, he can hardly see in front of him without his glasses. He can see all right if he has his good glasses—he has two pairs. Then, after I got kicked in the stomach accidentally, I was out for a short time. I don't think it could have been for long and after that I saw Mrs. Novick and she was trying to separate the parties.

Q. And she asked Mr. Gouldsberry to leave and he said he would and did? Is that right?

A. No, he didn't leave without a little force.

Q. And who used that force?

A. Well, the only thing, Tiny kept pushing him toward the door—Gilbert or Tiny, whatever they call him—and then he tried to get back in. This man Tiny is a pretty husky man—bigger, quite a

(Testimony of Mrs. Lucille Carroll.)

bit bigger than Mr. Gouldsberry. [125] I would say Mr. Carroll is smaller than Mr. Gouldsberry. I asked Ans to leave—told him hadn't he caused me enough trouble and asked him to leave. Mr. Gouldsberry threw the bottle that hit the light. [126] I saw him throw it. He picked it up and threw it. It didn't hit anybody; it hit the light. I guess it was the one from which he had been drinking. It was an uncapped beer bottle. I don't think he had had more than two or three swallows. There was beer all over the wall. This light is kind of at the end of the bar and when Mr. Carroll heard Mr. Gouldsberry call me this bad name he came down to that end of the bar. He was going around when Mr. Gouldsberry threw the bottle. He wasn't any space at all from Mr. Gouldsberry at the time Mr. Gouldsberry threw the bottle. But Bill is fast—he is even faster than I thought. I would say he was a little better than the width of the bar from Mr. Gouldsberry at the time the bottle was thrown. I guess the bar is maybe two feet—two and a half feet wide but he was kind of down this way—there is a slant at the end of the bar. That lamp is higher up than I am and I am tall. It is quite a little higher up—I think several feet. At that time, Mr. Carroll was behind the bar coming around. He was coming around—the fight was getting ready to start and I didn't want it to start. I was seated at the end stool. Mr. Gouldsberry was sitting at that time, on the stool away from me. There was one stool in between us. He was sitting on the third stool from

(Testimony of Mrs. Lucille Carroll.)

the end of the bar. He was half seated on the stool and one foot on the floor. I don't know whether you would call it exactly sitting down. I would call it half sitting and half standing. He got the other bottle right in front where Mr. Ottoson had had his bottle. That bottle had a little in it. I would say it was about half full. That was the second bottle Mr. Gouldsberry picked up. I don't know how he picked it up. He just grabbed it. You don't know just exactly how anybody does anything—when a fight or trouble starts you don't watch just exactly how it starts. I wouldn't say he turned the bottle upside down. I wouldn't say he had it by the neck. I would say he had it just like anybody else would have a bottle, around the middle. I didn't exactly notice his hands. I just knew there was trouble brewing. I saw him pick a bottle up. [127] He grabbed the bottle. I couldn't say exactly how his fingers were, but he grabbed the bottle. I don't think he grabbed it upside down, holding the neck and with the bottle upside down. The side of the bottle—the way it was, the side of the bottle—it seemed like the side of it hit his face when it went back. The center of the bottle hit his face. If we had a bottle maybe I could show you. I am trying to tell you—he grabbed this bottle—He was holding the bottle as a person normally holds a bottle, around the middle. Mr. Carroll knocked it back in his face. Mr. Gouldsberry had a cut on his face and it bled. The bottle didn't break, I don't think. It hit him on his cheek. I couldn't say which cheek but I know

(Testimony of Mrs. Lucille Carroll.)

I saw the blood. I didn't see any blood around his lips because the cut on his face was bleeding. I certainly have been convicted of a crime—drinking, once. That was right here in Seward.

And thereupon,

WILLIAM H. NOVICK

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is William H. Novick. I am one of the owners of the bar that has been discussed today. I am acquainted with the plaintiff, Mr. Gouldsberry. I have seen him four times before today—heard about him. I had, at one time, a man in my employ by the name of Bill Carroll. That is the same Bill Carroll who is one of the defendants in this action. I only know what was told to me by my wife and other people that witnessed it,—this affair which occurred in my place of business on the evening of the 5th of July, last year.

Q. Had you known of the existence of any ill feeling between Mr. Carroll and Mr. Gouldsberry prior to this occurrence?

A. There had been a fight right in front of the place sometime previous to this happening. I would say about six weeks prior to that. As I walked [128] out of the liquor store—I didn't know Mr. Gouldsberry at that time at all, but Mr. Carroll and Mrs.

(Testimony of William H. Novick.)

Gouldsberry—at that time—were approaching down the sidewalk going south toward the dock, and as they approached the front of the tavern Mr. Gouldsberry struck Mr. Carroll and knocked him down on the sidewalk, breaking his glasses. Mr. Carroll had his glasses on and there was another young man by the name of Ferguson—he is outside at the present time—struck Mr. Gouldsberry and knocked him out in the street alongside his car. And at that time Mr. Kerestine, the Chief of Police, come along and I asked him to pick Mr. Gouldsberry up, which he did, and sent him home and told him to behave himself. That was all that happened that night, and I went back in the liquor store. This next afternoon I was coming out of the liquor store and Mr. Gouldsberry happened to be coming by and spoke to me. He says: “I kind of made an ass out of myself last night.” And I looked at the gentleman—I didn’t know who it was. And it dawned on me it must have been Gouldsberry, and I said: “Yes you did more than that. You struck a man with glasses on. You might have blinded him.” And when I said that, he said: “I should kill him.” I said: “You have probably repeated the same thing to others and you might get in severe trouble because something might happen that you didn’t have anything to do with and you will be held responsible.” And somebody came along and I had to go into the liquor store, and that was my last conversation with him up until the time he was brought to the city jail. At this particular time, after this fight occurred,

(Testimony of William H. Novick.)

there were present at the bar, when I arrived, from the restaurant, Bill Carroll, my wife, and Gilbert, who they call Tiny—he used to do the porter work there after closing hours. Mrs. Carroll was there too. She was complaining about a pain in her stomach which we got Dr. Sellers to tend to. When I came, Bill Carroll was behind the bar. He had some blood on his jacket and was all mussed up. His hair was all rumped up too. And I told him to take the jacket off and clean himself up and calm down. I believe he continued in my [129] *employee* about two or three weeks. He is someplace in Seward here. That was Mr. Carroll that sat down here this morning for some time. The man has been broken up ever since his divorce come up and he has been doing some drinking and he is not in fit condition to talk. In other words, he is unreliable in what he says now—he is in a stupor. I have never had any difficulty whatsoever with Mr. Carroll while in my employ before in respect to his quarreling with any patrons of the bar, only that sometimes he takes one drink too many and the minute that happens he lets go. I have had the man employed time on and time off. He is honest and capable and very courteous when he is sober. On this evening I last saw him about fifteen minutes before I left and went over to the Palace. He was absolutely sober then—Hadn't drunk anything for weeks.

The defense rested.

And thereupon:

MR. GOULDSBERRY

called as a witness in his own behalf, testified in rebuttal as follows:

Direct Examination

By Mr. Davis:

I cannot recall having called those names having been mentioned here. I never called nobody no bad names. I don't recollect—I don't recollect calling them names. I deny it. I didn't throw a bottle and hit the lamp, that I know of. No, I did not. I never told Mr. Novick that I would kill the so-and-so if I got 20 years for it. I can't say as to whether I broke Mr. Carroll's glasses. I might have broken them. I won't say that I didn't and I won't say that I did because I can't say. I can't say that I did break them or that I didn't. I don't know. That is the occasion that I mentioned this morning in which I said I slapped him. I do remember pulling his glasses off because Mrs. Carroll said "Don't you hit him because he has glasses on." And I pulled them off. Whether she picked them up and took them in her hand, I don't know, because I was pretty mad. She was still my wife and married to me and I was supporting her, yet. When I went to the hospital I had bruises on my back and shoulder and across my chest and on my knee, [130] and I have got a scar there yet that I got—and on my face. It was all skinned. My doctor said they was just minor bruises. He said they would heal up and he said I was in pretty bad shape. I don't feel that

(Testimony of Mr. Gouldsberry.)

I am responsible in any way for what happened there in the bar. I didn't start no trouble that I know anything about. I was reasonable. I have never started trouble anywhere that I know of. I have been decent to everybody—treated everybody as near right as I know. But you can ride a good horse to death, you know. I was in the doorway when the police picked me up. I was not trying to get back in there that I know of. I was not trying to get back at Mr. Carroll there. I never called nobody no names. I did say he was a dirty rat and a skunk to hit me like he did hit me with a bottle. I do know that.

And thereupon, Plaintiff's case-in-chief having been reopened,

IRVIN L. METCALF

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Davis:

My name is Irvin L. Metcalf. I live in Seward, Alaska. I am Deputy United States Marshal, at Seward. Have been since September 1, 1939. I am fairly well acquainted around town. I know Mr. Gouldsberry. I know Mr. Bill Carroll. I know Mrs. Carroll, the former Mrs. Gouldsberry. I know the reputation for peace and quiet of Bill Carroll and it is poor. I know the reputation for peace and quiet for Mrs. Carroll. It is poor. I know the repu-

(Testimony by Irvin L. Metcalf.)

tation for peace and quiet of Mr. Gouldsberry. It is good. I know I had a conversation with Mr. Charlie Peterson concerning this matter some two or three weeks ago. I had some discussion with him as to whether or not this fight that took place down in Novick's was Mr. Gouldsberry's fault and he said it wasn't.

Cross-Examination

By Mr. Baumgartner:

I asked Mr. Peterson whether or not he had seen this. He said he had seen a disturbance there—part of the disturbance. I don't know whether he saw the beginning of it or not. He didn't say it was Mr. Carroll's fault. He didn't say it was anybody's fault. He said as far as he could see it was not Mr. Gouldsberry's fault. I didn't ask him how far he could see.

And thereupon,

DR. J. H. SHELTON

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Davis:

My name is J. H. Shelton. I reside in Seward. I am a physician and surgeon. I am duly authorized to practice in the Territory of Alaska—duly licensed. I have with me the original X-rays and the case record of the Seward General Hospital on

(Testimony of Dr. J. H. Shelton.)

treatment of Mr. Gouldsberry on July 8, I believe it was, 1946. The X-ray shows fracture of the bone of the ankle—fibula. I was not in Seward at the time this picture was taken. I am just looking at the picture now and it does show a fracture of the ankle. Mr. Gouldsberry came by the office to see me some several days ago,—I don't remember the date—and asked me to look at his X-rays for him and see whether they showed a broken ankle or not—which they did and which I told him they did show—a broken ankle. I think I told him as well as I can remember, that although he felt some small discomfort there in his ankle now, that it was the type of ankle that should get completely well and not leave him with any permanent disability. Such a break as this would cause a person pain and discomfort. He should not have a remarkable pain and discomfort over any long period of time, but naturally, at first it would be painful and after removal of the cast it would be somewhat stiff and tender—oh, for—one might say [132] for several months.

Cross-Examination

By Mr. Baumgartner:

A fracture of this type could be caused by almost any number of things.

Q. Could it be caused by a man kicking a woman?

A. I think if he got a good, clean kick that it probably wouldn't break his ankle. If he kicked pretty straight, it probably wouldn't. If his kick were not carefully placed it probably would.

(Testimony of Dr. J. H. Shelton.)

Redirect Examination

It is possible that the break could be caused by a tussle on the floor in which a number of parties were taking part.

And thereupon, the following proceedings were had:

Mr. Baumgartner: Is that the conclusion of your main case? At this time, then, I would like to make a motion that the verdict be directed instructing the jury that they find in favor of the defendants, Mr. and Mrs. Novick and Mrs. Carroll for want of sufficient evidence indicating that they have been responsible in any manner for this altercation or for the conduct of Mr. Carroll in it. Any altercation that he may have been engaged in venting his personal feelings in the matter against Mr. Gouldsberry, the testimony does not show, but the testimony does show that Mr. Novick was not even near the place. If it please the Court, in the plaintiff's complaint he has alleged that defendants Mrs. Novick, Mr. Carroll and Mrs. Carroll, each took part in this unjustified assault upon his person. The testimony of the plaintiff, himself, was such that he cannot state with certainty that Mrs. Novick put her hands on him at all except, possibly, to push him towards the door urging him to leave as quickly as possible, I suppose without causing any further commotion, disturbance or disruption in their premises. [133]

The testimony on the part of the plaintiff is equally cloudy as to whether or not his former wife, Mrs. Carroll, struck him any blows.

I should not refer, of course, to the testimony of the defendants since this motion should properly have been made after the close of the plaintiff's case, but since it has gone before the Court and is of record, it clearly shows that no blow was struck by any of the defendants with the exception of William Carroll himself.

Now, this appears from the testimony of both plaintiff and the defendants to have been the outcome of a long matrimonial dispute, quarrel or disturbance. Mr. Gouldsberry had not felt entirely right towards Mrs. Carroll after she had left him. He admitted that he struck Mr. Carroll in front of Mr. Novick's place. Mr. Novick also testified that he was anxious that there shouldn't be a further assault upon Mr. Carroll by Mr. Gouldsberry. Mr. Novick made no charge against him, asking he be taken quietly home and to please forget about it and to avoid any repetition of his conduct for fear that it might get him into some trouble; but he was not interested in causing Mr. Gouldsberry any difficulty. On the other hand, he was interested in protecting his interests.

Now, throughout the course of the trial it appears that what occurred was started by Mr. Gouldsberry. Even if it had not been started by Mr. Gouldsberry, if Mr. Carroll, knowing that there was ill feeling between himself and Mr. Gouldsberry, had gone out of his way—gone out on the street and pulled Mr.

Gouldsberry into the bar and struck the first blow, called him the names and had instigated the quarrel from its very inception, that hardly is within the scope of his employment as a servant of Mr. Novick. Has nothing whatsoever to do with his work as a bartender. In connection with his duties as an employee or servant, as the complaint refers to him, he is not supposed to accost or assault people that are in there as [134] patrons, and if he chooses to do something to vent his own personal grievance against anyone, Mr. Novick can't be responsible for that conduct. If that were true, any one of our employees, agent or servants might commit some atrocious crime and we would be held responsible. It would be different if he had done something in the course of his employment—if he had served a drink to Mr. Gouldsberry that was harmful to him, if he would have injured him in any other course, or if Mr. Novick or Mrs. Novick had aided and abetted him and instructed him: "When Mr. Gouldsberry comes in you throw him out" or something to that effect. That would have been an entirely different matter. Then it would have lent color to Mr. Carroll's attitude and consequent action towards Mr. Gouldsberry.

But in this instance Mr. Carroll had been sober and well behaved. It was during a period of his sobriety. The testimony is that he is a heavy drinker during the course of which periods he is unaccountable and his conduct poor. But on this particular occasion he hadn't been drinking. He was quietly minding his own business. He didn't ask to enter

this quarrel, nor did he start it. He merely tried to resist this assault on the part of the plaintiff, and in the course of this argument probably the plaintiff was injured. If he has a broken or fractured ankle as shown by the testimony of Dr. Shelton, undoubtedly he was. He may have sustained even more grave injuries. But that certainly is not the fault even of Mr. Carroll in this instance. If a man is attacked by someone, and in the course of his defending himself the attacker is injured, that is certainly justifiable.

In this instance we feel that Mr. Novick, Mrs. Novick, not having had anything to do with any injury or assault upon Mr. Gouldsberry, and also Mrs. Carroll, who merely stood by and was herself accidentally injured, she has been liberal enough to admit under oath that these blows that he struck were not intended for her—she received them accidentally. There has been no testimony that she struck and beat him. The plaintiff is confused. He doesn't know how to state positively whether a thing occurred or not until he had been prompted, and then he doesn't know definitely then what occurred. First he stated that he was knocked out and unconscious. Then he amended that by saying he was partially conscious—partially aware of what had happened. But he never at any time positively stated that either of these three defendants took any active part in beating, striking or causing him any injury.

And that reason—and for the reason that Mr. and Mrs. Novick as employer of Mr. Carroll, who

conducted this fight, with or without justification—should relieve them entirely from any responsibility whatsoever in connection with the assault.

I don't know—probably as far as the question of Mr. Carroll's liability in the matter is concerned, that is undoubtedly a matter for the jury to decide whether or not he, under the circumstances, should also be held unaccountable. But as far as these defendants are concerned, they are clearly, your Honor, out of the picture as far as being responsible or liable for any conduct on the part of the employee, Mr. Carroll.

We, therefore, think that the jury should be instructed that they cannot find a verdict against Mr. and Mrs. Novick and Lucille Carroll.

And thereafter, on Thursday, March 27, 1947, at 9:30 o'clock a.m., the following proceedings were had:

The Court denied the motion of the defendants for an instructed verdict on behalf of several of the defendants, said motion having theretofore been made by Mr. Baumgartner, and directed that the exceptions of the defendants be noted. [136]

And thereupon,

THOMAS E. HOWELL

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is Thomas E. Howell. I am, at present, Municipal Clerk and Magistrate, and was, on

(Testimony of Thomas E. Howell.)

the 5th day of July, 1946. There was a complaint made against one Anson E. Gouldsberry on the 5th day of July, 1946, if I remember right, and it was made by Mr. and Mrs. Carroll. Pete Kerestine made one at the same time. He was Chief of Police. (Witness is handed some papers.) Witness continuing: These were the complaints filed in that case. They are the original complaints, original records from my office.

The papers were offered and admitted in evidence and marked as Defendants' Exhibits A and B. The Witness continuing: I don't remember any other complaints made by any other person or persons against Mr. Gouldsberry at this time or at any other time during the month of July, 1946. I would have to look at the records. I don't believe either Mr. or Mrs. Novick ever made a complaint against Mr. Gouldsberry. I don't remember of my records showing such complaint having been made by either of them. (Witness is handed Defendants' Exhibit A). Witness continues:

This was signed by Peter P. Kerestine, who was Chief of Police July 5, 1947: "Started a fight and made a nuisance of himself on the streets of Seward and caused a disturbance." The outcome of that charge was he was given two days to produce witnesses. The trial was held Monday at 10 a.m., which was July 8, and he was fined \$50.00. He appeared before me Saturday morning, the day following. This case was heard on the second floor of the jail. I believe I was there when Mr. Gouldsberry

(Testimony of Thomas E. Howell.)

arrived. So far as I [137] know, he just walked up and down stairs. I don't remember whether or not he had any difficulty in walking (Witness is handed the Defendant's Exhibit B). Witness continuing:

This is signed by Lucille Carroll and William A. Carroll. This is the same date—July 5, 1946. It was fighting Mr. and Mrs. Carroll in Bill Novick's Bar—threw a bottle at and had Mrs. Carroll on the floor beating her up also. Call the parties several names and used awful profanity. The outcome of that charge was the same. He appeared Saturday morning and we gave him two days to produce his witnesses. Trial was held Monday, 10 a.m., July 8, 1946. He was fined \$100.00. He refused to pay the fines and I think he spent two or three days in jail. I would have to look at the record. And then he finally paid the fines. Both of these matters were heard at the same time. He chose to spend several days in jail rather than pay the fine at first. And then he subsequently paid the fines.

Cross-Examination

By Mr. Davis:

I have been City Clerk and Magistrate a year the first of next month, or the first of May, I should say. I had been City Magistrate about two months when this matter came up. It would be—yes, two months, I guess. Those complaints I have given you have been in my possession. I had them for awhile and then the Chief of Police took them and

(Testimony of Thomas E. Howell.)

kept them in his records. As a matter of practice here, I have had some complaints in my possession and he has had some.

Q. Now, were you in the court room yesterday when Mr. Kerestine testified? A. Yes, sir.

Q. Did you hear him testify that Mr. and Mrs. Novick did sign a complaint in this case?

A. I don't remember.

Q. Well, if he did so testify, is he mistaken?

A. It would be in the record anyway. These are the complaints; these are the original complaints.

Q. That is right, these are the original complaints. [138] The record might show what complaints were issued and so forth? These are two original complaints against Mr. Gouldsberry?

A. Correct.

Q. So far as these records go, there may be lots of other complaints? A. Right. [139]

One of Mr. Gouldsberry's friends paid his fine for him actually. I said he paid it because he was credited with the account. Actually, he refused to pay the fine. He said he'd rather stay in jail. He didn't believe the trial was fair, he said. He said he didn't think he was guilty of the charge and then one of his friends came over and paid the fine, at a later date. I didn't know that it was Mr. Pallage that paid the fine. Pete would have to check. I am not sure. I didn't receive the fine myself. Not directly, no.

And thereupon,

PETER P. KERESTINE

heretofore duly sworn, resumed the stand and testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

Q. Mr. Kerestine, did Mr. and Mrs. Novick sign a complaint against Mr. Gouldsberry?

A. On that complaint I probably got mixed up when Mr. and Mrs. Novick was up there with Mr. Carroll. At that time they were up at the station and I believe there were only two complaints signed. I don't know of the existance of any other. If there was they would probably be around the files. Mr. Gouldsberry didn't have any difficulty in walking, even kicking or fighting. At the time he walked upstairs he walked up by himself in the morning.

Cross-Examination

By Mr. Davis:

When I testified after that Mr. and Mrs. Novick did sign a complaint, I thought that they did but I probably was mistaken, unless at that time Carroll was over there——

Q. For what reason have you changed your testimony? You thought you were right yesterday?

A. Yes, because they was all [140] battered around there. No one has told me that they didn't sign a complaint since that time. I thought he ac-

(Testimony of Peter P. Kerestine.)

tually did sign the complaint because he came up there at the time Carroll was there in the morning. Yes, I received the fine money in this case. I remember when Mr. Pallage came to pay that fine that he said he wanted to see what he was buying here and asked to see the complaints. I don't recall showing him a complaint signed by Mr. and Mrs. Novick at that time. I showed him two complaints there. It is not a fact that Mr. Gouldsberry was charged \$50.00 on each of three complaints, making a \$150.00 fine. It was a hundred dollar fine and a fifty dollar fine. I had these complaints in my possession and I turned them over to the City Clerk. I probably had them in my possession on the tenth and maybe the 15th of July. I was at the city desk in the police station at that time. I actually thought when I testified yesterday that Mr. and Mrs. Novick signed the complaints. At that time, she came up, and it was in the morning that the complaint was signed. At that time, the Novicks were taking an active part in this, they came up there for court. That is the reason, probably that I thought they signed a complaint. That I thought so yesterday and don't think so today is not because Mr. Howell has testified there wasn't. It is because I wasn't quite clear yesterday on the case as it came up. Since I sat and heard the case, my recollection is a little better today than yesterday. What I most likely was thinking over last night was the trial up there at the city jail that went on.

(Testimony of Peter P. Kerestine.)

Redirect Examination

By Mr. Baumgartner:

You (referring to Mr. Baumgartner), never at any time, prior to my coming on the witness stand this morning, asked me anything [141] about these complaints.

And thereupon,

WILLIAM H. NOVICK

heretofore duly sworn, resumed the stand and testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

I heard Mr. Davis say something yesterday about the undisputed testimony regarding my remark that I would break Mr. Gouldsberry's neck. Mrs. Novick and I were both present this morning when Gouldsberry ran up the stairs to hear his trial.

Mr. Davis: That question is improper, your Honor. I object to it.

The Court: Objection is sustained.

Witness (continues): The first time I and Mrs. Novick came up there was Monday morning after he had his continuance to obtain witnesses and attorney. The time he was granted his continuance neither one of us was up there. There was a misunderstanding because I was late getting downtown and it was already postponed until the following

(Testimony of William H. Novick.)

Monday when I got down. Mr. Gouldsberry had already left. The time that I was present was on the 8th. The gentleman was asked if he had counsel, and he said that his counsel wasn't able to appear and that he would stand trial. And as I recall you was present, yourself, and at that time acting as City Prosecutor. I did make a remark to Mr. Gouldsberry about breaking his neck but I didn't state it in those words. I said: "If you continue messing with people you would probably—will get your neck broken." I didn't say I would do it. At that time I was a member of the council of the City of Seward. I was not on the Police Committee. I did not sign a complaint against—or any [142] other time. I have not signed any complaints against anybody since I have been in Alaska or Seward.

And thereupon,

MRS. ANNETTA NOVICK

heretofore duly sworn, resumed the stand and testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

I did not at any time in my life sign a complaint against Mr. Gouldsberry. I did hear vile and abusive language used by Mr. Gouldsberry in the bar on the evening of the 5th of July. When the porter and I was trying to get him to the front door, why, he was calling back names at Bill Carroll all the time, in a loud voice. There were quite a few other people

(Testimony of Mrs. Annetta Novick.)

present. I couldn't name just who they were. I was very much too busy to notice just who was there. It is not very ladylike to say some of the words he called back.

Q. I think probably the jury should know.

A. Well, he called him a cock-sucker, for one thing, and a dirty old rat, and there was more that I can't recall just the words. I told him then, I said: "Ans, don't use that language; I don't stand for it here." He said: "All right, Mrs. Novick," and he turned right around and still kept hollering back at him. We had him close to the door at that time. Gilbert and I—the porter—was pushing him toward the door trying to get him out, and he was fighting us all the way back. I don't mean he was hitting anybody, but he was trying to get away from us to get back and fight some more.

Mr. Davis: Your Honor, so far as I can see this is a direct rehash of testimony she gave yesterday I don't believe it is [143] proper rebuttal.

Court: Objection sustained.

And thereupon,

HENRY J. PALLAGE

heretofore duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Davis:

I did, sometime about the 10th or 15th of July, go to pay Mr. Gouldsberry's fine in this case. I

(Testimony of Henry J. Pallage.)

paid his fine. At the time I paid the fine I read the complaints. I was asked my reason for wanting to see those complaints. I said I wanted to pay the fine and asked to see the complaints. The city clerk asked me why I wanted to see them and I said: "I would like to see what I am paying for." That was my only reason for asking that. I read the complaints over to the police station. There were three complaints, and one was signed by Pete Kerestine and one was signed by Mr. and Mrs. Carroll, I believe—I wouldn't say for sure whose names all were on that one—and I was sure that there was one signed by Mr. and Mrs. Novick.

Cross-Examination

By Mr. Baumgartner:

I saw these complaints upstairs in the police station. There were three separate papers. I was positive there was three separate papers, yes. I have known Mr. Gouldsberry about two years, possibly a little more. I learned he was in difficulty by Guy Terrell, when he came by my cabin and told me—asked if I knew where Ans was and I said: "Why, no, I have no idea." "Well," he said, "He is in jail." I said: "What happened?" "Well," he said, "I don't know, but somebody should go down and see if they can help him." Well, naturally, I went down there to see what I could do and when I found that he had a \$150 fine to pay then I thought I would go pay it. There was no

(Testimony of Henry J. Pallage.)

other connection whatsoever. I would do that for any neighbor. He absolutely did not ask me to pay the fine. Nobody asked me to pay it. I went down and paid it. He paid me back. I didn't pay the full \$150, though, because just a minute or so before I went to pay it Peter Kerestine told me \$140 would be all right. I don't remember exactly how long it was before Mr. Gouldsberry paid me back. It wasn't very long after—possibly several days or so. You see, I was busy at the time doing other things and working and he was, I believe, in the hospital. I know one afternoon when I didn't work he went by later and he was in the—still in the hospital. I would say several days. I don't remember. I didn't pay any attention whatsoever to the dates. I wouldn't say that I am a very good friend of Ans's. I am a friend of most anybody in my neighborhood. He lives half a block or so from me. Sometimes I visit him frequently—it all depends. Sometimes—oh, two or three weeks may go by when I don't go close to his place. Then again I go over there, depending on what shift I work, or whether I am working or not or whether the boats are in or not. I wasn't present at the trial Ans had. I didn't know anything about it at all. I don't know what complaints were used at the trial. I was not in his trial. I didn't know he was arrested or in trouble or anything until this man came and told me he was in jail.

Q. And you are positive that you saw a complaint signed by Mr. and Mrs. Novick?

A. I am sure of that.

(Testimony of Henry J. Pallage.)

Q. And you are sure that the complaint was used against Mr. Gouldsberry?

A Well, it was assault and battery, and the other assault and battery, if I remember right, and then the third complaint the chief of police had signed said resisting an officer.

Q. Resisting an officer?

A. Resisting arrest. [145]

And thereupon, both sides having rested, the Court instructed the jury as follows:

Ladies and Gentlemen of the Jury, you are instructed as follows:

1.

“The plaintiff, Anson E. Gouldsberry, has brought this action against the defendants, William H. Novick, Annetta Novick, William Carroll and Lucille Carroll, claiming compensatory damages in the total sum of \$17,337 and punitive damages in the sum of \$500 on account of an alleged assault and battery committed by the defendants upon the person of the plaintiff at a place called Novick’s Cocktail Lounge, owned and operated by the defendants William H. Novick and his wife Annetta Novick at Seward, Alaska, on July 5, 1946, and by reason of other circumstances connected with such assault and battery as alleged in the plaintiff’s complaint in this action.

“The defendants in their answer have denied all liability and assert in substance that any damages sustained by plaintiff were the result of his own unprovoked attack upon the defendant, William Carroll.

“When you retire to consider of your verdict you will take with you to the jury room the plaintiff’s complaint and the defendant’s answer wherein the plaintiff has denied all of the allegations of the answer which are in conflict with the allegations of the plaintiff’s complaint. It is your duty to carefully read and consider these pleadings before discussing the merits of the case in order that you may fully understand the respective claims of the plaintiff and defendants.

2.

“In this case, as in all civil cases, the burden is upon the plaintiff to prove his case by a preponderance of the evidence only, and not, as in criminal cases beyond reasonable [147] doubt. Preponderance of evidence means the greater weight of evidence. If the evidence in your mind is equally balanced as between the plaintiff and defendant, then the verdict should be for the defendant, because the burden is upon the plaintiff to present evidence of greater weight than that in favor of the defendant before plaintiff is entitled to recover.

3.

“One who unlawfully and without just cause assaults and beats another is liable to such other person for the damages sustained by the latter, and if the assault and battery so committed were committed maliciously, then the guilty party is liable not only for the actual damages sustained by the person assaulted, but also may be subject to punitive damages as hereinafter explained.

“An assault is an attempt with unlawful force by one person to commit physical injury by violence upon another, and a battery is the consummation of assault whereby one person may beat or strike or injure, or in some cases even touch the other without lawful justification. It is for you to say from all of the evidence in the case whether the plaintiff sustained any such assault and battery at the hands of the defendants or any of them.

3-A

“Any person who is present at the commission of an assault and battery by one person upon another, encouraging or inciting the same by words, gestures, looks or signs, or who in any manner or by any means participates in such assault or assault and battery, is in law deemed to aid and abet therein and, therefore, is liable as a principal. But it is to be borne in mind that mere presence at the time and place of the commission [148] of an assault and battery does not render a person liable as a participant therein.

4.

“In this connection you are instructed that a person who is himself attacked always has the right of self defense. He is under no duty to retreat, but may stand his ground and repel force with force, and the person so attacked may use for his own protection such force as reasonably appears under the circumstances to be necessary for his protection.

“The use of abusive language by one person to another such as the calling of vile names, however repulsive or offensive such names may be, does not

under the law justify or excuse an assault and battery on the person guilty of using the offensive language. If you find from the evidence that the defendant William Carroll struck the plaintiff as alleged in the complaint, and if you further find that the plaintiff had not made and was not making any assault or battery on the defendant William Carroll, and that the only excuse offered by the defendant William Carroll for striking the plaintiff was the fact, if you find it to be a fact, that the plaintiff immediately before the defendant William Carroll struck the plaintiff called the defendant William Carroll, or the defendant Lucille Carroll, vile and offensive names, then it will be your duty to find for the plaintiff against one or more of the defendants, in harmony with these instructions, such damages as you may find from the evidence the plaintiff suffered, not to exceed the amount asked in the plaintiff's complaint.

5.

“No proof has been given that the defendant William H. Novick was present on the occasion when plaintiff claims he was [149] so unlawfully assaulted and beaten by the defendants, and testimony was admitted to show that said defendant William Novick was not present at that time. However, it is alleged in the complaint and admitted in the answer that the defendants William H. Novick and Annetta Novick were the owners and operators of the cocktail lounge where the altercation occurred, and that at that time the defendant William

Carroll was the employee of the defendants William H. Novick and Annetta Novick in said cocktail lounge. Therefore, it appears by the pleadings and by the evidence that at the time and place mentioned the relation of employers and employee existed between defendants William H. Novick and Annetta Novick as employers and the defendant William Carroll as employees.

“As employer may be liable for the acts of his employee resulting in injury to another person where the employee, in committing such injury, was acting within the scope of his employment and in the line of his duties while engaged in such employment, or if the employer ratified the act of his employee causing the injury to such other person.

“If in this case you may find from a preponderance of the evidence that the defendant, William Carroll, committed an unlawful assault and battery upon the plaintiff, and that in committing such assault and battery the defendant William Carroll was acting within the scope of his employment and in the line of his duties while engaged in such employment, or if you find that such unlawful assault and battery was committed by defendant William Carroll and that the defendants William H. Novick and Annetta Novick, or either of them, ratified the act of the defendant William Carroll in assaulting and beating the plaintiff, then the defendants William H. Novick and Annetta [150] Novick may be held liable in damages, as follows: If you find that the defendant William Carroll committed such alleged unlawful assault and battery upon the plain-

tiff and in so doing was acting within the scope of his employment, both of the defendants William H. Novick and Annetta Novick are equally liable in damages with the defendant William Carroll; and if the defendants William H. Novick and Annetta Novick, or either of them, ratified the said alleged unlawful acts of defendant William Carroll, the one or both of said defendants who so ratified are similarly liable in damages with the said defendant William Carroll.

“By ratifying a wrongful act of an employee, the employer may become liable in damages to another person injured thereby although he would not otherwise be liable. What constitutes ratification is a question of fact for the jury to determine. In this case it is for you to say from all of the evidence whether the defendants William H. Novick and Annetta Novick or either of them ratified the acts of the defendant William Carroll as regards the alleged unlawful striking and beating of the plaintiff.

“In this connection you may consider, and give such weight as you think proper, to the testimony received in the trial of the case relative to the continued employment of defendant William Carroll by defendants William H. Novick and Annetta Novick subsequent to July 5, 1946, the testimony of the alleged signing of criminal complaints against the plaintiff by the defendants William H. Novick and Annetta Novick on or after July 5, 1946, and the testimony relative to an oral statement alleged to have been made by the defendant William H.

Novick as to the altercation between the defendant Carroll and [151] the plaintiff which occurred on July 5, 1946, and the events connected therewith. With respect to this testimony, as in the case with all other testimony, you are the sole judge of its weight and value.

6.

“An employer is liable for the acts of his employee, even if such acts are wilfull or malicious, where they are done in the course of his employment and within its scope. But where an employee does a wilfull and malicious act resulting in injury to another while engaged in working for his employer, but outside of his authority, as when he steps aside from his employment to gratify some animosity, or private grudge, or to accomplish some unlawful purpose of his own, not in any manner connected with his employment or the duties thereof, and completely outside of the scope of his employment, the employer is not liable.

7.

“The proprietor of a place of amusement, or any other place of business, has the right to remove therefrom any person if such person is conducting himself in an unlawful or disorderly manner, using all necessary force to do so.

8.

“If you find that the plaintiff is entitled to recover damages from the defendants, or any of them, he is entitled to recover for the physical pain and mental anguish he endured, if any, as a result of the

alleged assault and battery, and his incarceration in jail, as well as compensation for time necessarily lost from his work by reason of the injuries which he claims to have sustained through such assault and battery; he is also entitled to recover the amount necessarily paid for the services [152] of a physician and all other sums that he was required to spend in order to heal and cure himself of his wounds. All of the foregoing items comprise what is known in law as "compensatory damages."

9.

"The plaintiff in this case demands punitive damages against the defendants in the sum of \$5000. Punitive damages are damages which may be granted as a punishment to the offender for the benefit of the community and a restraint to the person who has violated the law. Such damages are given only in cases where the act committed was malicious or wanton or showed a reckless indifference for the rights and welfare of another, or there is some other element of aggravation which justified such damages. No punitive damages can be given against any defendant unless such defendant is first found to be liable to the plaintiff for compensatory damages.

"If in this case you find for the plaintiff and against any of the defendants for any amount of compensatory damages, then you may consider whether you should further award to the plaintiff punitive damages. Such damages as hereinbefore indicated can be lawfully given only where the act of the defendant was malicious or wanton or showed

reckless indifference for human rights or welfare. It is within the province of the Jury to give or withhold punitive damages as the law and justice may require. Accordingly, in this case you should determine from all of the evidence, first, whether the plaintiff is entitled to compensatory damages, and if so, whether he is entitled to recover such damages from all of the defendants or from some or one of them, and then you may consider and should determine whether in addition to such compensatory damages you should award punitive damages in favor of the plaintiff and against the same defendants or defendant against [153] whom you assess compensatory damages.

10.

“The laws of Alaska provide that all questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although the jury has the power to find a general verdict, which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you believe to be errors of law upon the part of the Court.

“All questions of fact, other than these heretofore mentioned in these instructions, must be decided by jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider

any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

“You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

10-A.

“Testimony has been received showing that two of the witnesses [154] who testified in this case have been convicted of crime. Such testimony is admissible as bearing upon the credibility of the witnesses involved, and for no other purpose. It is for you to say whether, and to what extent, if at all, the credibility of said witnesses is affected by proof of former conviction of crime, for the credibility of all witnesses is for your sole determination.

11.

“The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

“However, your power of judging the effect of evidence is not arbitrary, but it is to be exercised with legal discretion and in subordination to the rules of evidence.

“You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

“A witness wilfully false in one part of his testimony may be distrusted in others.

“Testimony of the oral admissions of a party should be viewed with caution.

“Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

12.

“The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no

circumstances should you resort to that method of adjusting differences of opinion among yourselves.

13.

“At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, as far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

14.

“You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions. [156]

“As you have been heretofore instructed, your duty is to determine the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the Court in these instructions.

“During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

15.

“Upon retiring to the jury room to consider your verdict, you will elect one of your number who will speak for you and date and sign the verdict unanimously agreed upon. You will take with you the pleadings in the case consisting of the plaintiff’s complaint, the defendants’ answer and the plaintiff’s reply to said answer, the exhibits and these instructions.

“Several forms of verdict have been prepared for your use. You may find a verdict in favor of the plaintiff and against all of the defendants, or against such of the defendants as you think should be required to pay damages to the plaintiff under the evidence and under these instructions as to the law, or you may find for all of the defendants and against the plaintiff.

“If you find for the plaintiff and against all of the defendants you should use the form of verdict which is marked Verdict No. 1, and insert therein the amount of damages which you find the plaintiff is entitled to recover of the defendants as compensatory damages, and also the amount of damages, if any, which you find that the plaintiff is entitled to recover of the defendants as punitive damages.

The verdict should be dated and signed by your foreman and returned into court as your verdict.

“If you find for the plaintiff and against one or more, but not all, of the defendants, then you should use the form of verdict which is marked Verdict No. 2, and insert therein the names of the defendants whom you find to be liable to respond in damages to the plaintiff as well as the amount of compensatory damages and punitive damages, if any, and also insert therein the names of the remaining defendants for whom you find as against the plaintiff. This verdict should then in like manner be dated and signed by your foreman and returned into court as your verdict.

15-A.

“If you find for all of the defendants and against the plaintiff, then you should use Verdict No. 3, which may be dated and signed by your foreman and returned into court as your verdict.

“The verdicts not used by you should be destroyed by your foreman.

“Dated at Seward, Alaska, this 27th day of March, 1947.”

And I have signed this as District Judge.

Counsel may come to the desk with the reporter to take exceptions.

(At this time the following proceedings were had in the presence of the jury but not in the hearing of the jury:)

Mr. Baumgartner: In regard to Instruction No. 5, it seems as though too frequent reference is made to the term “within the scope of employ-

ment” without giving that phrase any definition, thereby making it possible for the jury to feel as though anything that might be done in there was within the scope of his employment. The plaintiff will undoubtedly play up very strongly the fact that anything that was done by Carroll was under the course of employment as a bartender. We would prefer to have some paragraph inserted to the effect that if the defendant Carroll conducted himself in such a manner as he did, he did not necessarily [158] act within the scope of his employment.

The Court: Has counsel any definition to suggest? Have you written out anything?

Mr. Baumgartner: It appears as though the word “scope of employment” in this particular instance could be defined, perhaps, such as the following:

“If the jury finds that the defendants Novick”—

both Novicks, that is—

“placed any instrumentality in the hands of the defendant Carroll such as would then give him an opportunity to use such an instrumentality or agency in such manner that it might do harm to one of the patrons of the cocktail lounge, rather than having him conduct himself independent of any instrumentality that might be there; for example, if the Novicks handed Carroll a bottle, or placed some other weapon near his place of employment to use in cases such as these, or had previously told him that; if there is any argument use this, or use that—”

The testimony shows that he was quiet and peaceful during the course of his employment, and when he didn't conduct himself in that manner he was discharged.

The Court: Is that all there is to——

Mr. Baumgartner: That is all.

The Court: The exception, of course, is noted as of course and it may be that I can——

Mr. Davis: I wonder, your Honor, if you haven't taken care of that objection by some of the other instructions which say if a man steps outside of the scope of his employment for purposes of his own the employer is not liable?

The Court: I thought I should define "scope of employment" and [159] I wasn't able to get a definition satisfactory to myself without going into evidence, and I think it is the duty of the Court not to make any such comment under the guise of instructions. At any rate, you have the exception.

Mr. Baumgartner: I am fully aware of the existence of this instruction which Mr. Davis called your attention to—No. 6—but nevertheless if there are two instructions, one of which might enable the jury to lean toward one rather than the other, that is not quite fair to the defendants. One side will say: "Well, sure, they are not liable," but the other side will say: "Well, here it is."

The Court: Very well. Anything else?

Mr. Baumgartner: That is all.

The Court: Mr. Davis? By the way, before you get through: I did not give in express language any of the instructions submitted by counsel for the

defendants, but if counsel desires he can now take exception to the refusal of the Court to give those instructions as submitted and they may be filed. The record will show now that the instructions submitted by counsel for defendants are each and all refused except as embraced in instructions as given. Do you wish to take exception to the refusal of the Court to give your instructions. It might not do any harm, and if you should want to appeal——

Mr. Baumgartner: Yes.

The Court: Record may show an exception by the defendants to the refusal of the Court to give the instructions requested, if that is satisfactory?

Mr. Baumgartner: Yes. [160]

The instructions referred to above, requested by the defendants and which the Court refused to give to the jury, are as follows:

DEFENDANTS' REQUESTED INSTRUCTIONS

I.

The Court instructs you that the law is the master, in this case Mr. and Mrs. Novick, is not responsible for the acts of the servant, in this case William Carroll, done outside of the masters' business and to accomplish some end personal to the servant himself; that the law does not imply any authority from the master to the servant to commit an assault upon a person who is not injuring or threatening to injure the master's property, and who is not interfering with the servant's performance of his duty to the master; and if, in this case, you believe from

the evidence, that the defendant William Carroll struck the plaintiff Anson E. Gouldsberry for some reason or purpose of his own, the plaintiff cannot recover in this case from the defendants William Novick and Annetta Novick, and your verdict must be for the defendants William Novick and Annetta Novick.

II.

The jury is instructed that the outcome of any altercation of an employee with others, resulting from an assault and battery precipitated by matters and things having nothing to do with the duties and employment of such employee, is not within the scope of the employment of such employee, and the employers cannot be held accountable therefor; that if the defendant William Carroll had any kind of personal quarrel with the plaintiff Gouldsberry, in or upon the premises of the defendants William Novick and Annetta Novick, and such quarrel resulted in injury or damage to the plaintiff Anson E. Gouldsberry, then the defendants William Novick and Annetta Novick cannot be held responsible, or liable therefor, unless it is shown by the evidence that the employers William Novick and Annetta Novick actually participated in the quarrel, argument or fight, or encouraged or aided [161] the employee Carroll.

III.

The jury is instructed, that if it is reasonably satisfied from the evidence on this trial that the plaintiff Anson E. Gouldsberry, made threats to do harm to the defendant William Carroll, and if

in fact the plaintiff Anson E. Gouldsberry carried out his threats by assaulting the defendant William Carroll, who was at the time an employee of the defendants William H. Novick and Annetta Novick; and the defendant, in resisting the attack of the plaintiff Anson E. Gouldsberry, caused the plaintiff Gouldsberry any injury, then the defendant Carroll cannot be held liable therefor, and the defendants Novick, Carroll's employers, can in no manner be held responsible or liable for any injury or damage to the plaintiff Anson E. Gouldsberry.

IV.

The jury is instructed that the proprietor of any place of business has the right to remove any person therefrom if such person is conducting himself in a disorderly manner; that in this case, either Mr. or Mrs. Novick, or their employee, Mr. Carroll, had the right, and it was their duty, to cause the plaintiff to be moved by force if necessary from the bar or cocktail lounge, if, from the evidence, the plaintiff Gouldsberry was conducting himself in a manner not conducive to peace and good order, and if the plaintiff was making a disturbance likely to cause injury or damage to persons or property in or upon the premises of the Novicks.

V.

The jury are charged that if they shall be reasonably satisfied from the evidence that the alleged assault and battery by Carroll upon the plaintiff in the case arose out of a personal dispute between the plaintiff and the said Carroll, they must find a verdict for the defendants, notwithstanding the fact

that Carroll was in the employ of the defendant Novick at the time of the alleged assault, unless they shall be reasonably satisfied that defendant authorized or participated in such act.

Mr. Baumgartner: Yes

Court: It will not hurt your record any.

Mr. Baumgartner: As long as the exceptions are shown, it is satisfactory.

Mr. Davis: Your Honor, I wish to except to the failure to give a portion of Requested Instruction No. I on behalf of the plaintiff, the portion having to do with the fact that the jury may infer that the party lent his aid and his countenance and approval to the assault and battery, if any, by reason of the fact of him being present and not taking any part to stop the affray.

Court: Exception will be noted.

Mr. Davis: I wish to except to the failure of your Honor to give Requested Instruction No. II on behalf of the plaintiff.

Court: Exception will be noted.

Mr. Davis: Also Requested Instruction No. III.

Court: Exception will be noted.

Mr. Davis: Requested Instruction No. IV.

Court: Exception will be noted as of course.

Mr. Davis: I think as to Requested Instructions V and VI your Honor has given them substantially, in other wording. No exception to failure to give V and VI.

Court: All of the instructions submitted by counsel for the plaintiff may be filed and the ruling of the Court is that each and all of the requested in-

structions will be marked: "Refused except as embraced in instructions given. Exception taken and allowed."

Mr. Davis: As to Instruction No. 6 as given by the Court, it seems to me that there should be a sentence on the end to the effect that employer is not liable for the acts of the employee outside the scope of his authority unless the employer [163] ratifies the act, as ratification has been mentioned in the previous instructions. Of course, I realize the Court has instructed the jury they are not to pick out any one instruction—they are to consider the instructions as a whole—and if that is done, 6 by itself is all right, but if No. 6 is picked out as one instruction then it isn't broad enough, in my opinion. I wish to take exception to it to that extent. That's all.

Court: I am not sure it isn't covered, but I shall add to No. 6 by putting a comma after "liable" and add the words:

"unless you find by a preponderance of the evidence that the employer has ratified the acts of his employee as hereinbefore explained."

All right, anything else? I will say that orally to the jury now.

Mr. Baumgartner: If the Court please, now, as this instruction stands isn't there a likelihood that the jury might feel as though simply because he was retained in employment——

Court: They may, but that seems to be the law.

Mr. Baumgartner: That wouldn't constitute ratification.

Court: It is evidence of ratification, that is, the law puts that construction on it, in my judgment. If you desire——?

Mr. Baumgartner: Yes, we except to that instruction.

Court: Well, the record will show that Mr. Baumgartner excepts to the inclusion of this additional language in No. 6. Is that right?

Mr. Baumgartner: Yes.

Court: You except to the giving of that?

Ladies and gentlemen of the Jury: Aided by the advice of counsel, I am adding one clause to Instruction No. 6. I will [164] read that again so will have it all.

“An employer is liable for the acts of his employee, even if such acts are wilfull or malicious, where they are done in the course of his employment and within its scope. But where an employee does a wilfull and malicious act resulting in injury to another while engaged in working for his employer, but outside of his authority, as when he steps aside from his employment to gratify some personal animosity, or private grudge, or to accomplish some unlawful purpose of his own, not in any manner connected with his employment or the duties thereof, and completely outside of the scope of his employment, the employer is not liable, unless the jury finds by a preponderance of the evidence that the employer has ratified the acts of his employee as hereinbefore explained.”

Court: Before starting arguments I think it may be as well to take a recess, and court will stand in recess for ten minutes until ten minutes of eleven.

(Whereupon recess was had at 10:40 o'clock a.m.)

After Recess

Court: May I advise counsel that in the amendment to instruction No. 6 I at first used the word "you" and in writing it I have substituted the words "the jury." It means the same thing.

Counsel for plaintiff may proceed to opening argument. The record, without objection, will show all members of the jury present.

Mr. Davis: Your Honor, I am willing to waive reporting of the argument if Mr. Baumgartner is.

Mr. Baumgartner: Yes [165]

Court: Very well, record may show reporting of argument is waived pursuant to stipulation of counsel, and reporter may be excused until recalled.

(Reporter was recalled at 11:25 o'clock a.m.)

Court: After the instructions were given one of counsel suggested that the instructions were deficient because no attempt had been made to define certain phases such as "scope of employment" or "course of employment", and while at that time I was not ready to attempt a definition, while counsel for plaintiff was arguing I have written out an additional instruction with a view of endeavoring to give the jury some advice upon the meaning of the

terms used in the instructions as written. This instruction will be afterwards typed and will be included in the instructions. It will be numbered 5-C.

5-C

“Reference has been made to acts done by an employee “within the scope of his employment” or in “the course of his employment.” Those phrases are not easily defined.

“An act done by an employee is within the scope of his employment and in the course of his employment where such act is or reasonably appears to be necessary, or proper, or suitable, to accomplish the purpose, or the work, or the duties of his employment, although in excess of the powers actually conferred on the employee by the employer. But an act is not necessarily done in course of employment or within scope of employment because done on the employer’s premises and by use of the employer’s property. An act cannot be said to be within the scope of the employment, where the employer himself, if present, would have no authority to do the act.” [166]

And thereafter, the case having been argued by the respective counsel and the case having been submitted to the jury, the jury on March 27, 1947, returned a verdict for the plaintiff finding for the plaintiff and against the defendants and awarding the plaintiff the sum of \$2000.00 compensatory damages, and the sum of \$1500.00 punitive damages.

And thereafter, on the 30th day of June, 1947, the Court entered its judgment in accordance with said verdict.

And thereafter, and within the time allowed by law, the defendants filed their motion for a new trial, which motion, was denied by the Court to which ruling the defendants excepted and the exception was allowed.

And thereafter, on the 15th day of September, 1947, the defendants having filed their petition for an appeal in said action, and said appeal having been allowed, the Court granted the period of 75 days for the filing and presentation of a Bill of Exceptions in this cause.

The matters and things hereinabove in this Bill of Exceptions set forth not fully appearing of record, the said defendants, William H. Novick and Annetta Novick, tender and present the foregoing as their Bill of Exceptions in said cause and pray that the same be settled, allowed, signed and sealed, and made a part of the record in said cause by this Court, pursuant to law in such cases.

Dated at Anchorage, Alaska, this 8th day of October, 1947.

/s/ GEORGE B. GRIGSBY

Attorney for Defendants

Service admitted this 8th day of October, 1947.

/s/ EDWARD V. DAVIS

Attorney for Plaintiff

[Endorsed]: Filed Oct. 8, 1947. [167]

DEFENDANT'S EXHIBIT "A"

Gouldsberry vs. Novick

S-4337

In the Municipal Court of the Town of
Seward, Alaska

THE TOWN OF SEWARD, ALASKA,

Plaintiff,

vs.

ANSON E. GOULDSBERRY

Defendant.

Complaint for Violation of Ordinance

No. Ord. 31. No. Se. 18

Anson E. Gouldsberry, is accused by City of
Seward. in this complaint of the violation of Ord.
38 Sec 18 Committed as follows, to wit:

The said Anson E. Gouldsberry in the corporate
limits of the Town of Seward, Alaska, and within
the jurisdiction of this Court, did, wilfully and un-
lawfully, on the 5th day of July started a fight and
mad a nuisance of himself on the streets of Seward
and cause a disturbance contrary to the form of the
Ordinances in such cases made and provided.

/s/ P. P. KERESTINE.

Subscribed and sworn to before me this 6th day
of July, 1946.

/s/ THOS. E. HOWELL.

Municipal Magistrate

Town of Seward, Alaska.

Monday 10:00 A.M. F.E.H.

July 8, 1946 \$50.00 Bail. [168]

DEFENDANT'S EXHIBIT "B"

Gouldsberry vs. Novick

S-4337

In the Municipal Court of the City of
Seward, Alaska

THE CITY OF SEWARD, SEWARD, ALASKA

Plaintiff,

vs.

ANSON E. GOULDSBERRY,

Defendant.

Complaint for Violation of Ordinance

No. Ord. 31. No. Sec. 2

Anson E. Gouldsberry, is accused by Mr. & Mrs. Bill Carroll in this complaint of the violation of Ord. 38, Sec. 2 Committed as follows, to wit: Assault and Battery.

The said Anson E. Gouldsberry in the corporate limits of the City of Seward, Alaska, and within the jurisdiction of this Court, did, wilfully and unlawfully, on the 5th day of July, 1946, was fighting Mr. and Mrs. Carroll in Bill Novick Bar, threw a bottle at and had Mrs. Carroll on the floor beating her up also, called the parties several names and used awful profanity. Contrary to the form of the Ordinances in such cases made and provided.

/s/ LUCILE CARROLL,

WILLIAM A. CARROLL.

Subscribed and sworn to before me this 6th day of July, 1946.

/s/ THOS. E. HOWELL,

Municipal Magistrate, City of

Seward, Seward, Alaska.

Monday 10:00 A.M. T.E.H.

July 8, 1946 \$100.00 Bail [169]

In the District Court for the Territory of
Alaska Third Division

No. A-4337

ANSON E. GOULDSBERRY,

Plaintiff,

vs.

vs.

WILLIAM NOVICK, ANNETTA NOVICK,
WILLIAM CARROLL, and LUCILLE
CARROLL,

Defendants.

STIPULATION

It is hereby stipulated and agreed by and between counsel for the plaintiff and defendants above-named, that the foregoing Bill of Exceptions and statement of the testimony introduced at the trial of the above-entitled action is a true, correct and accurate statement thereof.

It is further stipulated and agreed, that said Bill of Exceptions may be approved and settled as the Bill of Exceptions in said cause immediately and without further notice.

Dated at Anchorage, Alaska, this 16th day of January, 1948. [170]

/s/ EDWARD V. DAVIS,
Attorney for Plaintiff

/s/ GEORGE B. GRIGSBY,
Attorneys for Defendants

[Title of District Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS

The defendants in the above-entitled action, William H. Novick, and Annetta Novick, having applied to the Court for an order approving the foregoing Bill of Exceptions in the above-entitled action, and plaintiff and defendants by and through their respective counsel having stipulated that said statement of evidence and Bill of Exceptions is a true, correct and accurate statement of all the testimony introduced in the trial of said cause, and having stipulated that said Bill of Exceptions may be approved and settled as the Bill of Exceptions in said cause without further notice; and

It further appearing that said Bill of Exceptions contains a statement of the evidence in the case in condensed and narrative form and by question and answer, and is complete and correct, and said Bill of Exceptions having been heretofore presented to the Court for settlement within the time allowed by law and the rules of this Court, and the Court being fully advised in the premises, it is therefore

Ordered, that the foregoing Bill of Exceptions be, and the same hereby is approved and settled as the Bill of Exceptions in the above-entitled cause upon appeal of the defendants to the United States Circuit Court of Appeals for the Ninth Circuit; and it is

Further Ordered, that this order shall be deemed and taken as a certificate of the undersigned Judge of this Court who presided at the hearing of said

cause, and before whom all the evidence in said cause [171] was given; that the said Bill of Exceptions contains a condensed statement in narrative form and by question and answer of all the evidence given in said cause, and upon which the judgment therein is based.

Dated this 16th day of January, 1948.

/s/ ANTHONY J. DIMOND,
Judge. [172]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court, Third Division,
Alaska:

You are hereby requested to make transcript of record in the above-entitled action to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in said cause, and to include in such transcript the following papers of record in said cause:

1. Complaint.
2. Demurrer.
3. Order Overruling Demurrer.
4. Answer.
5. Reply.
6. Instructions.
7. Verdict.
8. Motion for a New Trial, and affidavits in support of and in opposition to said motion.
9. Memorandum of exceptions to Instructions.

10. Defendant's requested Instructions Nos. 1, 2, 3, 4, and 5.
11. Judgment.
12. Petition for Appeal.
13. Order Allowing Appeal.
14. Citation on Appeal. [173]
15. Assignment of Errors.
16. Minute Orders of Sept. 15, October 20, Dec. 5, 1947, and Jan. 16, 1948.
17. Bill of Exceptions.
18. This Praecipe.

/s/ GEORGE B. GRIGSBY,

Attorney for Defendant and
Appellant.

Service admitted this 16th day of January, 1948.

DAVIS & RENFREW,

By /s/ G. KELLNER,

Attorney for Plaintiff and
Appellee.

[Endorsed]: Filed Jan. 16, 1948. [174]

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD

United States of America,
Territory of Alaska, Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed pages, numbered from 1 to 174, inclusive, are a full, true and correct transcript of the records

and files of the proceedings in the above entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the stipulation for praecipe filed in my office on the 16th day of January, 1948; that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to \$43.30, has been paid to me by George B. Grigsby, counsel for the appellant herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 19th day of February, 1948.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court, Territory of Alaska,
Third Division. [175]

[Endorsed]: No. 11869. United States Circuit Court of Appeals for the Ninth Circuit. William H. Novick and Annetta Novick, Appellants, vs. Anson E. Gouldsberry, Appellee. Transcript of Record. Upon Appeal from the District Court for the Territory of Alaska, Third Division.

Filed February 27, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11869

WILLIAM H. NOVICK and
ANNETTA NOVICK,

Appellants,

vs.

ANSON E. GOULDSBERRY,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD
TO BE PRINTED

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

Please be informed that the appellants in the
above entitled action hereby adopt as Points on
Appeal on which they intend to rely the Assign-
ments of Error appearing in the Transcript of Rec-
ord and also the following additional points:

I.

That the court erred in instructing the jury as
follows (Extract from Instruction 4):

“The use of abusive language by one person
to another such as the calling of vile names,
however repulsive or offensive such names may
be, does not under the law justify or excuse an
assault and battery on the person guilty or
using the offensive language. If you find from
the evidence that the defendant William Carroll

struck the plaintiff as alleged in the complaint, and if you further find that the plaintiff had not made and was not making any assault or battery on the defendant William Carroll, and that the only excuse offered by the defendant William Carroll for striking the plaintiff was the fact, if you find it to be a fact, that the plaintiff immediately before the defendant William Carroll struck the plaintiff called the defendant William Carroll, or the defendant Lucille Carroll, vile and offensive names, then it will be your duty to find for the plaintiff against one or more of the defendants, in harmony with these instructions such damage as you may find from the evidence the plaintiff suffered, not to exceed the amount asked in the plaintiff's complaint."

Error is assigned on the above instruction on the ground that said instruction is not predicated on the evidence in the case, in that there was no evidence in the case to the effect that the defendant William Carroll, offered any excuse for striking the plaintiff, and in that the defendant, William Carroll, was not a witness in the trial of said cause and in that the only evidence offered in the case as a justification of the acts and conduct of the said William Carroll referred to in said instruction was evidence of self defense; that said instruction was erroneous because it assumes throughout that the said William Carroll was the aggressor, and ignores his defense of self defense as set forth in the answer

herein; and that said instruction was erroneous in that it ignores the question whether or not the acts of William Carroll were in the scope of his employment, or were ratified by the defendants William H. Novick and Annetta Novick, or either of them, and in that said instruction in effect instructs the jury to find a verdict in favor of the plaintiff and against one or more of the defendants, provided the jury finds the facts to be as stated, recited or assumed in said instruction, and regardless of the defenses set up by the defendants and the testimony in support thereof; and in that the words "in harmony with these instructions" are so vague and meaningless as to in no wise qualify said instruction.

II.

That the court erred in giving to the jury Instruction No. 6, which is as follows:

"An employer is liable for the acts of his employe, even if such acts are willful or malicious, where they are done in the course of his employment and within its scope. But where an employe does a willful and malicious act resulting in injury to another while engaged in working for his employer, but outside of his authority, as when he steps aside from his employment to gratify some personal animosity or private grudge, or to accomplish some private purpose of his own, not in any manner connected with his employment or the duties thereof, and completely outside the scope of his employment, the employer is not liable, unless

you find by a preponderance of the evidence that the employer has ratified the acts of his employe as hereinbefore explained,”

to which instruction defendants excepted as follows:

After the jury had been instructed and while counsel for both sides were engaged in taking their exceptions to said instructions the following proceedings occurred:

The Court: * * * I shall add to No. 6 by putting a comma after “liable” and add the words:

“unless you find by a preponderance of the evidence that the employer has ratified the acts of his employe as hereinbefore explained.”

* * * * *

Mr. Baumgartner: If the Court please, now, as this instruction stands isn't there a likelihood that the jury might feel as though simply because he was retained in employment——

The Court: They may, but it seems to be the law.

Mr. Baumgartner: That wouldn't constitute ratification.

The Court: It is evidence of ratification, that is, the law puts that construction on it, in my judgment. If you desire?

Mr. Baumgartner: Yes, we except to that instruction.

The Court: Well the record will show that Mr. Baumgartner excepts to the inclusion of this additional language in No. 6.

Appellant designates for printing the entire type-written Transcript of Record on appeal as certified by the Clerk of the District Court, with the exception of the following:

1. The instructions of the Court appearing on pages 18 to 30 inclusive of said Transcript of Record.
2. The Motion for a New Trial appearing on pages 32 to 62 inclusive of said Transcript of Record.
3. Memorandum of Exceptions appearing on pages 63 to 73 inclusive of said Transcript of Record.

/s/ GEORGE B. GRIGSBY,
Attorney for Appellants.

Service admitted March 15, 1948.

/s/ EDWARD V. DAVIS,
Attorney for Appellee.

[Endorsed]: Filed March 17, 1948.

No. 11,869

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

WILLIAM H. NOVICK and ANNETTA
NOVICK,

Appellants,

vs.

ANSON E. GOULDSBERRY,

Appellee.

Upon Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

R. E. BAUMGARTNER,

GEORGE B. GRIGSBY,

Anchorage, Alaska,

Attorney for Appellants.

E. COKE HILL,

1507 Hobart Building, San Francisco, California,

Of Counsel.

FILED

AUG 16 1948

PAUL R. GIBSON

Subject Index

	Page
Statement of basis for jurisdiction	1
Statement of the case	3
Specifications of errors relied upon	6
Questions involved	15
Argument	17
The plaintiff had failed to prove a cause of action against appellants Novick sufficient to be submitted to the jury (a) at the close of the plaintiff's testimony; and (b) at the time of the motion for new trial	17
The servant was not acting within the scope of his employ- ment	18
Neither defendant participated in the battery	22
Neither appellant ratified Carroll's assault	25
First: Retention of Carroll as an employee	25
Second: Testimony as to signing complaints	26
Third: Testimony relative to an oral statement alleged to have been made by William H. Novick.....	27
There was prejudicial error in the court's instructions.....	29
First: Scope of employment	29
Second: Instructions as to ratification	31
Third: Ambiguous and obscure instruction	36
Fourth: Error in instructing as to the elements of damages	37

Table of Authorities Cited

Cases	Pages
Barney v. Jewel Tea Company, Inc., 139 Pac. (2d) 878....	21
Copper River & N. W. Ry. Co. v. Reeder, 211 Fed. 280....	17
Dillingham v. Anthony, 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139	33
Everingham v. Chicago B. & Q. R. Co., 148 Iowa 662, 127 N. W. 109, Ann. Cas. 1912C 848	34
G., C. & S. F. Ry. Co. v. Kirkbride, 79 Tex. 457, 15 S. W. 495	26
Jenkins & Reynolds Co. v. Alpena Portland Cement Co., 147 Fed. 641	18, 24
Kastrup v. Yellow Cab Company, 282 Pac. 742.....	26, 35
Kwiechen v. Holmes & H. Co., 106 Minn. 148, 118 N. W. 668, 99 L.R.A. (N.S.) 255	35
Lightner Mining Co. v. Lane, 161 Cal. 689, 120 Pac. 771	32
Mandel v. Byron, 191 Wis. 446, 211 N. W. 145	35
Sullivan v. People's Ice Corp., 92 Cal. App. 764.....	33
Supervisors v. Schenck, 5 Wall. 772, 18 L. Ed. 556.....	34
Voss v. Baker, 28 Fed. Cas. No. 17012, 1 Cranch C.C. 104	32
Washington Gas Light Company v. Lansden, 172 U. S. 534, 43 L. Ed. 543, 19 S. Ct. 296	19
Wells v. Robinson Brothers Motor Co., 153 Miss. 415, 121 So. 141	35
Williams v. Pullman Palace Car Company, 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631	25, 30

TABLE OF AUTHORITIES CITED

iii

Statutes	Pages
Act of June 6, 1900, 31 Stat. L. 321, as amended 35 Stat. L. 839, 840, C.L.A. 1933, Sec. 1091	2
28 U.S.C.A. Sec. 225 (Judicial Code, Sec. 128)	2

Texts

15 Am. Jur. (Damages), page 37, Sec. 289	28, 32
34 Am. Jur. 720, "Malicious Prosecution", Sec. 29	38
35 Am. Jur. 998, "Master and Servant", Sec. 563	34
1 American Law Institute's Restatement of the Law of Agency, Sec. 245	21
39 C. J. 1266, "Master and Servant", Sec. 1448, "Ratification by Master"	32
39 C. J. 1363, "Master and Servant", Sec. 1593	31
7 Labatt (Master and Servant), Second Edition, page 7896	28, 32
1 Restatement of the Law of Agency:	
Chapter 4, page 197, Section 82	31
Chapter 7, Section 228	29
Section 235	30

No. 11,869

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM H. NOVICK and ANNETTA
NOVICK,

Appellants,

VS.

ANSON E. GOULDSBERRY,

Appellee.

Upon Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

STATEMENT OF BASIS FOR JURISDICTION.

On the 20th day of November, 1946, Anson E. Gouldsberry, the appellee above named, commenced this action in the District Court for the Territory of Alaska, for the Third Division, against William H. Novick and Annetta Novick, appellants above named, William Carroll and Lucille Carroll to recover from them \$22,250.00 damages alleged to have been suffered by him because of an assault alleged to have been committed upon him by the defendants on the 5th day of July, 1946, in the Town of Seward, Third Division, Territory of Alaska. (Tr. pp. 2-7.) At the time of the

alleged assault, and when the complaint was filed, each of the defendants in said action was a resident of said Town of Seward.

The District Court for the Territory of Alaska is a Court of general jurisdiction. Act of June 6, 1900, 31 Stat. L. 321, as amended 35 Stat. L. 839, 840, C.L.A. 1933, Sec. 1091, the pertinent parts of which are: "There is established a District Court for the Territory of Alaska * * * with general jurisdiction in civil * * * causes."

The defendants' demurrer was overruled (Tr. p. 8) and their answer filed (Tr. pp. 9-14) and a reply was filed by plaintiff. (Tr. p. 15.) Trial was had before a jury which returned its verdict in favor of plaintiff against all the defendants for \$2,500.00 compensatory damages and \$1,000.00 punitive damages. (Tr. p. 17.) On June 30, 1947, judgment was rendered, filed and entered in favor of plaintiff and against the defendants, jointly and severally, for \$2,500.00 compensatory damages, \$1,000.00 punitive damages, and for plaintiff's costs and disbursements. (Tr. pp. 18, 19.) This appeal followed, and this Court has jurisdiction by virtue of the provisions of Sec. 225, Vol. 28, U.S.C.A. (Judicial Code, Sec. 128) as amended, the pertinent parts of which are: "The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions * * * Third. In the District Courts for the District of Alaska, or any division thereof * * * in all cases."

STATEMENT OF THE CASE.

It is alleged in the complaint and admitted in the answer that on July 5, 1946, defendants William H. Novick and Annetta Novick were husband and wife and were the owners and operators of a public cocktail lounge in Seward, Alaska, and had in their employ as barkeeper in their cocktail lounge, defendant William Carroll; that on said date, plaintiff Anson Gouldsberry lawfully entered said cocktail lounge, and at the time of Gouldsberry's entry there were in said lounge, defendant William Carroll, defendant Lucille Carroll, and other customers. (Paragraphs I, II, III and IV of the Complaint, Tr. pp. 2, 3; Paragraphs I and II of the Answer, Tr. p. 9.) Shortly after Gouldsberry entered said cocktail lounge, defendant Annette Novick came into the lounge from an adjacent liquor store, also belonging to the Novicks, to get a drink of water and, after she had spoken to friends, returned to the liquor store. (Testimony of Mrs. Novick, Tr. p. 66; Ottoson, Tr. pp. 57, 60; Mrs. Carroll, Tr. p. 71.)

The evidence shows without dispute that the hour of Gouldsberry's visit to the cocktail lounge was sometime after 9:30 in the evening (Tr. p. 32); that within the forty days preceding said July 5, 1946, defendant Lucille Carroll had been divorced from plaintiff Gouldsberry and married to defendant Carroll (Tr. p. 70); that a short time prior to her divorce from Gouldsberry he had met her on the street with Carroll and had "slapped Carroll over" (Tr. p. 40); that when Gouldsberry entered the bar, Carroll was and had been sober for weeks (Tr. p. 79), and that he exchanged pleasant greetings with Gouldsberry (Tr.

p. 41) and indicated that his wife was sitting at the end of the bar. However, Gouldsberry sat at the bar some distance from Mrs. Carroll and drank from a bottle of beer. (Tr. p. 41.) A few moments later Gouldsberry moved over next to Mrs. Carroll and commenced talking with her; they began to quarrel and a fight soon started. (Testimony of Gouldsberry, Tr. p. 32; of Ottoson, Tr. pp. 56-58; of Lucille Carroll, Tr. pp. 70, 71 and 74.) Defendant William H. Novick was not present at any time during the time Gouldsberry was in the bar, but had gone to a restaurant and when he returned Gouldsberry was not in the bar. (Tr. p. 79.) As Mrs. Novick was seated in the liquor store adjacent to the cocktail lounge, she heard "a racket" in the cocktail lounge and "dashed in there to see what it was all about." (Testimony of Mrs. Novick, Tr. p. 66; of Ottoson, Tr. p. 58; and of Lucille Carroll, Tr. p. 71.) She found Gouldsberry and Carroll fighting and they were down on the barroom floor. Mrs. Carroll was also on the floor unconscious. Mrs. Novick first tried unsuccessfully to get Mrs. Carroll away from the fighters; then she ordered Carroll to get back of the bar, and he did. (Testimony of Mrs. Novick, Tr. p. 68; of Lucille Carroll, Tr. p. 71.) Then Mrs. Novick and Gilbert (the swamper) ejected Gouldsberry from the barroom onto the street, using no unnecessary force to do so.

Concerning the commencement of the fight and the trouble preceding it, the testimony of Gouldsberry conflicts with the testimony of every other witness who testified on the subject.

In the meantime, Charlie Peterson, who had been in the barroom while the fight was in progress had gone out and found a policeman and notified him of the fight, and thereafter had seen Novick and told him there was a fight at the bar. (Tr. p. 61.) Upon being notified, the policeman went immediately to the Novick bar; found Gouldsberry still on the street trying, according to the testimony of all witnesses but himself, to get back into the bar. The policeman arrested Gouldsberry and took him to the City Jail. It was then about 11:00 o'clock Friday night (Tr. p. 35); and Gouldsberry remained in jail until Saturday morning, when he was taken before the Municipal Magistrate, who set his trial for Monday morning, and released him. Gouldsberry went to Anchorage (114 miles), consulted an attorney, and returned to Seward. (Tr. p. 36.) He was tried before the Municipal Magistrate Monday morning upon two complaints, made Saturday, July 6th, one by the policeman, P. P. Kerestine, based upon Gouldsberry's action on the street; and one by Lucille Carroll and William Carroll charging Gouldsberry with assault and battery. (Tr. pp. 89, 90.) Gouldsberry was convicted on each complaint and fined \$50.00 on the former and \$100.00 on the latter. (Tr. pp. 89, 90.) He refused to pay his fines and was committed to jail where he remained two or three days before paying his fines. (Tr. pp. 90, 96, 97.) He did not appeal.

SPECIFICATIONS OF ERRORS RELIED UPON.

The Court erred and abused its discretion:

1. In overruling the motion of defendant William H. Novick, made at the close of plaintiff's rebuttal evidence, for a directed verdict in favor of said defendant, based upon the ground that there was insufficient evidence before the jury to justify a verdict for plaintiff, and the further ground that the verdict of the jury was for excessive damages appearing to have been given under the influence of passion or prejudice.

Assignment of Error No. I, motion for new trial, paragraphs (D) and (C).

2. In overruling the motion of defendant Annetta Novick, made at the close of plaintiff's rebuttal evidence, for a directed verdict in favor of said defendant, based upon the ground that there was insufficient evidence before the jury to justify a verdict for plaintiff. Assignment of Error No. I.

3. In denying the motion for new trial, made on behalf of each of the defendants William H. Novick and Annetta Novick, based on the ground that there was no substantial evidence to justify the verdict against either of said defendants. Assignment of Error No. II.

4. In instructing the jury as follows:

“The use of abusive language by one person to another such as the calling of vile names, however repulsive or offensive such names may be, does not under the law justify or excuse an assault and battery on the person guilty of using

the offensive language. If you find from the evidence that the defendant William Carroll struck the plaintiff as alleged in the complaint, and if you further find that the plaintiff had not made and was not making any assault or battery on the defendant William Carroll, and that the only excuse offered by the defendant William Carroll for striking the plaintiff was the fact, if you find it to be a fact, that the plaintiff immediately before the defendant William Carroll struck the plaintiff called the defendant William Carroll, or the defendant Lucille Carroll, vile and offensive names, then it will be your duty to find for the plaintiff against one or more of the defendants, in harmony with these instructions such damages as you may find from the evidence the plaintiff suffered, not to exceed the amount asked in the plaintiff's complaint." (Tr. p. 101.)

Error is assigned on the above instruction on the ground that said instruction is not predicated on the evidence in the case, in that there was no evidence in the case to the effect that the defendant William Carroll offered any excuse for striking the plaintiff, and in that the defendant William Carroll was not a witness in the trial of said cause and in that the only evidence offered in the case as a justification of the acts and conduct of the said William Carroll referred to in said instruction was evidence of self defense; that said instruction was erroneous because it assumes throughout that the said William Carroll was the aggressor, and ignores his defense of self defense as set forth in the answer herein; and that said instruction was erroneous in that it ignores the

question whether or not the acts of William Carroll were in the scope of his employment, or were ratified by the defendants William H. Novick and Annetta Novick, or either of them, and in that said instruction in effect instructs the jury to find a verdict in favor of the plaintiff and against one or more of the defendants, provided the jury finds the facts to be as stated, recited or assumed in said instruction, and regardless of the defenses set up by the defendants and the testimony in support thereof; and in that the words "in harmony with these instructions" are so vague and meaningless as to in no wise qualify said instruction.

5. In instructing the jury as follows:

"An employer may be liable for the acts of employees resulting in injury to another person where the employee, in committing such injury, was acting within the scope of his employment and in the line of his duties while engaged in such employment, or if the employer ratified the act of his employee causing the injury to such other person.

If, in this case, you find from a preponderance of the evidence, that defendant William Carroll committed an unlawful assault and battery upon the plaintiff and that, in committing such assault and battery, the defendant, William Carroll, was acting within the scope of his employment and in the line of his duties while engaged in such employment, or if you find that such unlawful assault and battery was committed by defendant, William Carroll, and that the defendants William H. Novick and Annetta Novick or either of them,

ratified the act of the defendant William Carroll, in assaulting and beating the plaintiff, then the defendants, William H. Novick and Annetta Novick, may be held in damages as follows:

* * * * *

In this connection, you may consider and give such weight as you think proper to the testimony received in the trial of the case relative to the continued employment of defendant William Carroll by defendants William H. Novick and Annetta Novick, subsequent to July 5, 1946, the testimony of the alleged signing of criminal complaints against the plaintiff by defendants William H. Novick and Annetta Novick on or after July 5, 1946." (Tr. p. 103.)

To this instruction, the defendants Novick, in the presence of the jury and before it retired, objected as follows:

"Mr. Baumgartner. In regard to Instruction No. 5, it seems as though too frequent reference is made to the term 'within the scope of employment' without giving that phrase any definition, thereby making it possible for the jury to feel as though anything that might be done in there was within the scope of his employment. The plaintiff will undoubtedly play up very strongly the fact that anything that was done by Carroll was under the course of employment as a bartender. We would prefer to have some paragraph inserted to the effect that if the defendant Carroll conducted himself in such a manner as he did, he did not necessarily act within the scope of his employment." (Tr. pp. 112, 113.)

6. In instructing the jury as follows:

“An employer is liable for the acts of his employee, even if such acts are wilfull or malicious, where they are done in the course of his employment and within its scope. But where an employee does a wilfull and malicious act resulting in injury to another while engaged in working for his employer, but outside of his authority, as when he steps aside from his employment to gratify some personal animosity, or private grudge, or to accomplish some unlawful purpose of his own, not in any manner connected with his employment or the duties thereof, and completely outside of the scope of his employment, the employer is not liable, unless the jury finds by a preponderance of the evidence that the employer has ratified the acts of his employee as hereinbefore explained.” (Tr. p. 120.)

To this instruction, the defendants Novick, in the presence of the jury and before it retired, objected as follows:

“Mr. Baumgartner. If the Court please, now, as this instruction stands isn't there a likelihood that the jury might feel as though simply because he was retained in employment—

Court. They may, but that seems to be the law.

Mr. Baumgartner. That wouldn't constitute ratification.

Court. It is evidence of ratification, that is, the law puts that construction on it, in my judgment. If you desire—?

Mr. Baumgartner. Yes, we except to that instruction.

Court. Well, the record will show that Mr. Baumgartner excepts to the inclusion of this additional language in No. 6. Is that right?

Mr. Baumgartner. Yes." (Tr. pp. 119, 120.)

The additional language designated by the Court is: "unless the jury finds by a preponderance of the evidence that the employer has ratified the acts of his employee as hereinbefore explained."

7. In refusing to instruct the jury as follows:

Defendants' Requested Instruction No. 1 (Tr. p. 115).

"The Court instructs you that the law is the the master, in this case Mr. and Mrs. Novick, is not responsible for the acts of the servant, in this case William Carroll, done outside of the masters' business and to accomplish some end personal to the servant himself; that the law does not imply any authority from the master to the servant to commit an assault upon a person who is not injuring or threatening to injure the master's property, and who is not interfering with the servant's performance of his duty to the master; and if, in this case, you believe from the evidence, that the defendant William Carroll struck the plaintiff Anson E. Gouldsberry for some reason or purpose of his own, the plaintiff cannot recover in this case from the defendants William H. Novick and Annetta Novick, and your verdict must be for the defendants William Novick and Annetta Novick; to which ruling defendants excepted and exception was allowed."

8. In refusing to instruct the jury as follows:

Defendants' Requested Instruction No. 2 (Tr. p. 116).

"The jury is instructed that the outcome of any altercation of an employee with others, resulting from an assault and battery precipitated by matters and things having nothing to do with the duties and employment of such employee, is not within the scope of the employment of such employee, and the employers cannot be held accountable therefor; that if the defendant William Carroll had any kind of personal quarrel with the plaintiff Gouldsberry, in or upon the premises of the defendants William Novick and Annetta Novick, and such quarrel resulted in injury or damage to the plaintiff Anson E. Gouldsberry, then the defendants William Novick and Annetta Novick cannot be held responsible, or liable therefor, unless it is shown by the evidence that the employers William Novick and Annetta Novick actually participated in the quarrel, argument or fight, or encouraged or aided the employee Carroll; to which ruling defendants excepted and exception was allowed."

9. In refusing to instruct the jury as follows:

Defendants' Requested Instruction No. 3 (Tr. p. 116).

"The jury is instructed, that if it is reasonably satisfied from the evidence on this trial that the plaintiff Anson E. Gouldsberry made threats to do harm to the defendant William Carroll, and if in fact the plaintiff Anson E. Gouldsberry carried out his threats by assaulting the defendant William Carroll, who was at the time an employee of the defendants William A. Novick

and Annetta Novick; and the defendant, in resisting the attack of the plaintiff Anson E. Gouldsberry, caused the plaintiff Gouldsberry any injury, then the defendant Carroll cannot be held liable therefor, and the defendants Novick, Carroll's employers, can in no manner be held responsible or liable for any injury or damage to the plaintiff Anson E. Gouldsberry; to which ruling defendants excepted and exception was allowed."

10. In refusing to instruct the jury as follows:

Defendants' Requested Instruction No. 4 (Tr. p. 117).

"The jury is instructed that the proprietor of any place of business, has the right to remove any person therefrom if such person is conducting himself in a disorderly manner; that in this case, either Mr. or Mrs. Novick, or their employee, Mr. Carroll, had the right, and it was their duty, to cause the plaintiff to be removed, by force if necessary, from the bar or cocktail lounge, if, from the evidence, the plaintiff Gouldsberry was conducting himself in a manner not conducive to peace and good order, and if the plaintiff was making a disturbance likely to cause injury or damage to persons or property in or upon the premises of the Novicks; to which ruling defendants excepted and exception was allowed."

11. In refusing to instruct the jury as follows:

Defendants' Requested Instruction No. 5 (Tr. p. 117).

"The jury are charged that if they shall be reasonably satisfied from the evidence that the

alleged assault and battery by Carroll upon the plaintiff in the case arose out of a personal dispute between the plaintiff and the said Carroll, they must find a verdict for the defendants, notwithstanding the fact that Carroll was in the employ of the defendant Novick at the time of the alleged assault, unless they shall be reasonably satisfied that defendant authorized or participated in such act; to which ruling defendants excepted and exception was allowed."

12. In giving to the jury the following portion of instruction No. 8 (Tr. pp. 105, 106),

"if you find that the plaintiff is entitled to recover damages from the defendants, or either of them, he is entitled to recover for the physical pain and mental anguish he endured, if any, as a result of the alleged assault and battery, and his incarceration in jail. * * *"

Error is assigned to this instruction for the reason that it affirmatively appears from the evidence that the plaintiff, Anson E. Gouldsberry, was arrested by a police officer of the town of Seward, complaint was filed against him by said police officer, upon which complaint he was tried and convicted; he was also tried upon a complaint signed by William Carroll and Lucille Carroll upon which he was tried and convicted. That these complaints were based upon his actions, and his physical pain and mental anguish, if any, endured because of his incarceration in jail were not caused in any way by these appellants or either of them, and his conviction was and is a complete defense to any action claiming damages by reason of his arrest and incarceration.

13. In giving the jury the following portion of instruction No. 9 (Tr. p. 107):

“Accordingly, in this case you should determine from all of the evidence, first, whether the plaintiff is entitled to compensatory damages, and if so, whether he is entitled to recover such damages from all the defendants or from some or one of them, and then you may consider and should determine whether in addition to such compensatory damages you should award punitive damages in favor of the plaintiff and against the same defendants or defendant against whom you assess compensatory damages.” (Tr. p. 107.)

Error is assigned to this instruction, as applied to these appellants, for the reason that there was no evidence submitted to the jury which warranted an instruction that the jury could award punitive damages against either or both of them.

QUESTIONS INVOLVED.

1. The jury having found that Carroll made an assault upon Gouldsberry was there any substantial evidence: (a) That such assault was within the scope of Carroll’s employment? (b) That either appellant participated in such assault? (c) That either appellant ratified such assault?

Raised by motion for directed verdict (Tr. p. 84), motion for new trial (paragraphs C and D) (Tr. pp. 23, 24) and by exceptions to instructions 4, 5 and 6 given by the Court (Tr. pp. 101-105) and defend-

ants' requested instructions 1, 2, 3, and 5. (Tr. pp. 115-117.)

2. Did the Court correctly instruct the jury as to ratification: (a) In failing and omitting to instruct them that full knowledge as to the facts is essential and a prerequisite to a ratification? (b) In instructing the jury that ratification was a question of fact for them to determine? (c) In omitting to instruct the jury that an employer cannot ratify the tort of his employee done outside the scope of the employee's authority unless the employer has received some benefit or advantage from the tort? (d) In instructing them as to the particular parts of the testimony they could consider as evidence of ratification, thereby inviting them to find ratification and in effect saying that if those facts existed they proved ratification?

Raised by exceptions to the Court's instructions 4, 5, and 6, and defendants' requested instructions Nos. 1, 2, 3 and 5, *supra*.

3. Was any instruction on ratification warranted by the evidence?

Raised by the Court's refusal to give defendants' requested instructions Nos. 1, 2, 3, and 5. (Tr. pp. 115-117.)

4. Was there sufficient evidence to warrant the jury in rendering a verdict for punitive damages against these appellants?

Raised by motion for directed verdict, motion for new trial, and refusal of Court to give requested instructions, *supra*.

5. Was there sufficient evidence to warrant the jury in rendering any verdict against these appellants?

Raised as 3 and 4, *supra*.

6. Did the Court's instruction No. 4 (Tr. p. 101), amount to a direction to the jury to find a verdict for plaintiff, and if so was it justified by the evidence?

Raised by appellants' "Statement of Points on Appeal." (Tr. p. 131.)

ARGUMENT.

THE PLAINTIFF HAD FAILED TO PROVE A CAUSE OF ACTION AGAINST APPELLANTS NOVICK SUFFICIENT TO BE SUBMITTED TO THE JURY (A) AT THE CLOSE OF THE PLAINTIFF'S TESTIMONY; AND (B) AT THE TIME OF THE MOTION FOR NEW TRIAL.

Appellants recognize that the motion for a directed verdict or for a nonsuit, and the motion for a new trial made for the reason that the plaintiff had failed to prove his case, is each addressed to the sound discretion of the trial Court and are not reviewable except for a manifest abuse of that discretion. *Copper River & N. W. Ry. Co. v. Reeder*, 211 Fed. 280, 286.

Abuse of that discretion is "manifest" when, upon an examination of the record, the Appellate Court finds that there is no SUBSTANTIAL evidence to support the verdict, and "substantial evidence" "is something of a substance and relevant consequences, and not vague, uncertain or irrelevant matter not carrying the quality of 'proof' or having fitness to

induce a conviction.” *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 147 Fed. 641, 643.

It is conceded that the plaintiff's positive testimony (Tr. p. 33) warranted the trial judge in submitting to the jury the issue as to whether Gouldsberry or William Carroll commenced the affray. Assuming that the jury obeyed the first paragraph of the Court's Instruction 4 (Tr. p. 101), it must have found that Carroll was not assaulted as alleged by Lucille Carroll (Tr. p. 71), and in that respect the verdict of the jury must stand.

**THE SERVANT WAS NOT ACTING WITHIN THE SCOPE
OF HIS EMPLOYMENT.**

The testimony of Lucille Carroll (Tr. p. 70, et seq.), substantiated by that of Ottoson (Tr. pp. 56, 59), and Gouldsberry's own specific admissions (Tr. p. 42) show the circumstances immediately prior to and leading to the affray. Trouble commenced when Gouldsberry began an argument with Mrs. Carroll. It is apparent from the testimony that Carroll, the then newly married husband, probably smarting under the recollection that he had been recently “slapped over” by Gouldsberry (Testimony of Gouldsberry, Tr. p. 40) and angry at hearing his wife berated, embarked upon his own private quarrel. Whether the altercation between Gouldsberry and Mrs. Carroll was as described by Gouldsberry (Tr. p. 42), merely an intimation by Gouldsberry that as his wife Mrs. Carroll had favored another at his expense, or whether it

involved the specific insults and accusations that Mrs. Carroll described (Tr. pp. 70, 71, 73 and 74) or was “bad, or vile—slander * * *” as Ottoson testified (Tr. p. 58) no reasonable person can doubt from all the testimony that Carroll in assaulting Gouldsberry was venting his ire at an unpleasant situation created by Gouldsberry, and no reasonable person can avoid the conclusion that when Carroll made that attack he was neither acting within the scope of his employment nor engaging in his employer’s business. Nor did his action further the interests of his employers nor was it so intended.

Not only do the circumstances plainly indicate that Carroll’s attack on Gouldsberry was not within the scope of his employment, but, under the Court’s instruction 5 C. (Tr. p. 122), if given, “An act cannot be said to be within the scope of the employment, where the employer himself, if present would have no authority to do the act,” the jury were practically instructed that Carroll’s attack was not within the scope of his employment, since it is apparent that Novick if present would have no authority to make it.

Appellants contend that the above evidence places this case on all fours with *Washington Gas Light Company v. Lansden*, 172 U.S. 534, 544, 545 and 548; 43 L. Ed. 543; 19 S. Ct. 296; an action against the Gas Light Company as employer and Bailey, its secretary, Orme, its assistant secretary, and Leetch, its general manager, for a libel alleged to have been published by the defendants. Verdict was for the

plaintiff. The trial Court denied a new trial and entered judgment on the verdict. That judgment was affirmed by the Court of Appeals for the District of Columbia, and the defendants brought the case before the Supreme Court on a writ of error.

After a detailed review of the evidence, in which it appeared that Leetch, the general manager, had written the letters which instigated the libelous publication, the Court then considered the question whether the acts of Leetch were within the general scope of his employment as manager, saying (p. 545):

“We are then limited to an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that Leetch had the necessary authority to act for the company in this business. If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. But if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide.”

After reviewing the evidence as to the duties of the general manager, the Court said (p. 548):

“We are of the opinion that the court erred in submitting to the jury the question whether Leetch, in respect to the subject of the letters written by him to Brown, had authority to bind the company. The court should have directed a verdict for the corporation on the ground that there was an entire lack of evidence upon which to base a verdict against it.”

Similar to the instant case is *Barney v. Jewel Tea Company, Inc.*, 139 Pac. (2d) 878, an action brought by Lucinda Barney against the Tea Company, as master, and George A. Davis, as servant, to recover compensatory and punitive damages suffered by reason of an assault upon her made by Davis, a collector for the Tea Company, arising from her refusal to pay her bill without receipts for former payments. Just as in the case at bar, a fight followed, in which a number of people were more or less involved. A verdict was rendered for the plaintiff against the defendants, and the Jewel Tea Company appealed. The Supreme Court reversed because the servant Davis was not acting within the scope of his authority. After noting that the authorities were conflicting, the Court said (p. 879):

“We believe the better rule to be that a principal is not liable for the wilful tort of an agent which is committed during the course of his employment, unless it is committed in the furtherance of his employer’s interests, or unless the employment is such that the use of force could be contemplated in its accomplishment.” (Citing a number of authorities: among others, the American Law Institute’s Restatement of the Law of Agency, Vol. 1, Sec. 245, and cases from Alabama, Kansas, Washington, New York, Kentucky and Minnesota.)

Appellants respectfully urge that an examination of the evidence in the instant case leads to the conclusion that the question as to whether Carroll was

acting within the scope of his employment became one for the Court to decide, and that the judge erred in submitting it to the jury. He should have instructed that Carroll's acts were not within the scope of his employment.

According to the trial Court's instructions there were two ways in which a verdict against appellants would be warranted, even though the jury found that Carroll's tort was not within the scope of his authority: (1) If the defendants or either of them participated in the attack, the jury could bring in a verdict against the defendant or defendants so participating (Instruction 5, Tr. p. 104; Instruction 6, p. 105; and Instruction 3-A, p. 101); and (2) if the defendants or either of them ratified the said alleged unlawful acts of defendant William Carroll, the jury could bring in a verdict against the defendant or defendants so ratifying. (Instructions 5 and 6, Tr. pp. 102, 103, 104 and 105.)

NEITHER DEFENDANT PARTICIPATED IN THE BATTERY.

It is admitted that William Novick took no part in the affray but in his complaint Gouldsberry alleged that Mrs. Novick participated in the actual battle.

In appellee's testimony on direct examination he described the attack made by Carroll (Tr. p. 33) and testified "After I was on the floor, I felt something beating on me and I twisted and turned and kicked and fought to get up and protect myself."

“Q. Do you know who it was that was on you at that time?” (Tr. p. 34.) “A. At that time? Well, I was knocked unconsciously. Mrs. Novick was there at the bar when I offered to buy her and Charlie Ottoson and Carroll a drink. Whether I did or not, I can’t recollect—whether she accepted a drink or not * * *. When I come to and was near the door I know that Mrs. Novick had her hands on my shoulders shoving me to the door.”

On cross-examination Gouldsberry testified (Tr. p. 43) that from the time the bottle hit him until he “got to the door” he knew nothing except that he was knocked backward off the stool and onto the floor, and he remembers he had blood in his eyes and he twisted and turned to get up. To the direct question (Tr. p. 44), “Did Mrs. Novick strike you?” he answered, “I can’t say that she struck me, no.” Five times thereafter, in answer to direct questions as to Mrs. Novick’s striking him, he replied that he did not know (Tr. pp. 44, 45) and, finally (Tr. p. 48), he again said, “I say, I don’t know who was beating on me. Mrs. Novick had ahold of me. Nobody was striking me when they were taking me to the door. Yes, somebody was striking me when I was on the floor, when I become partly conscious.”

“Q. Who Mr. Gouldsberry? A. Mrs. Novick and Mrs. Carroll and the fellow who worked in the second hand store. Q. They were striking and beating you? A. Yes, stomping on me and kicking me—I don’t know what they were hitting me with. Q. You remember that definitely now? A. Yes, when I come

to, when I was knocked out on the floor and I felt something beating on me and I seen who was around me—I did see them, yes. There was blood in my eyes. I couldn't see very well. I could see well enough to see that." (Tr. p. 48.)

Contained in the testimony following the question "Who Mr. Gouldsberry?" *supra*, is the only testimony in the whole record where anyone even indicates that Mrs. Novick struck Gouldsberry. Mrs. Carroll, Mr. Ottoson and Mrs. Novick herself deny that she struck or beat Gouldsberry. After Gouldsberry's many refusals to say that he knew Mrs. Novick struck him, his last answers as to what he saw when he was becoming conscious were evidently explanatory. He was saying that Mrs. Novick was among those who were around him when he could knowingly distinguish them, and her presence convinced him that she had taken part in the beating. Appellants contend that Gouldsberry's testimony with its inconsistencies and contradictions was not "substantial evidence" and did not carry the quality of "proof" or "having fitness to induce a conviction." *Jenkins & Reynolds v. Alpena Portland Cement Company*, *supra*.

To charge Mrs. Novick as a participant she must have been shown to share in Carroll's criminal intent. (16 C. J., p. 128, Criminal Law, Sec. 115.) There is no testimony that Mrs. Novick had a community of "unlawful purpose" in Carroll's act. It is indisputable that when she arrived, she directed Carroll to leave, and he went. Her activities were all directed

to stopping the fight and restoring order. Since the jury's verdict against Mrs. Novick must have been based upon participation, the Court should have set it aside.

NEITHER APPELLANT RATIFIED CARROLL'S ASSAULT.

In Instruction 5, the Court directed the jury's attention to testimony which might be considered as ratification by these appellants, to-wit:

First: Retention of Carroll as an employee.

This was mentioned only twice in the testimony. Mrs. Novick testified (Tr. p. 69): "I don't remember how long Mr. Carroll worked for me after this. I don't remember. He did not quit the next day. I don't remember whether he quit the next week or not. I can't tell you because I don't know."

Novick testified (Tr. p. 79): "I believe he continued in my employ about two or three weeks."

In *Williams v. Pullman Palace Car Company*, 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631, an action for damages based upon a porter's attack upon a passenger, verdict and judgment were for plaintiff against employer. The porter was criminally prosecuted and convicted of assault and battery; and was thereafter retained in the company's employ. It was claimed that such continued employment amounted to ratification. The Court said:

"The porter had been discharged for other causes before the trial of this suit, and we think the defendant company cannot be charged with

ratification of such an outrage because in the conflict between the statements of parties it believed its own servant and at all events thought it just to preserve the status quo until judicial determination of the dispute." (The judgment was reversed.)

In *Kastrup v. Yellow Cab Company*, 282 Pac. 742, which was an action to recover damages for battery inflicted on Kastrup by the company's superintendent of cab drivers, there is a rather exhaustive discussion of almost every question raised in the instant case. It was there claimed that because Harris, who made the assault, was not discharged it amounted to ratification. The Kansas Supreme Court quoted with approval from *G., C. & S. F. Ry. Co. v. Kirkbride*, 79 Tex. 457, 15 S. W. 495, as follows:

"We think it would be extending the doctrine of ratification too far to apply it to such a case as the one before us. * * *

The rule invoked (that retaining the employee in the employment was ratification) might lead to the discharge of an innocent and useful servant, when wrongfully accused or suspected, because his employer could not be certain in advance what would be the result of a future trial, and, instead of taking the risk of being charged with a pecuniary liability for which he was not otherwise responsible, might discharge the servant."

Second: Testimony as to signing complaints.

The city magistrate who tried Gouldsberry produced the original complaints (copies are in the transcript, pp. 124, 125), upon which he was tried,

neither of which was signed by the Novicks; and he testified (Tr. p. 89): "I don't believe Mr. or Mrs. Novick ever made a complaint against Gouldsberry." Mr. and Mrs. Novick each denied having signed any complaint against Gouldsberry. (Tr. p. 95.)

Pallage testified (Tr. p. 97) that he saw, at the police station, a complaint signed by Mr. and Mrs. Novick; and Kerestine first testified that Mr. and Mrs. Novick signed a complaint, and then admitted (Tr. p. 92) that he was "probably" mistaken. Also, neither the testimony of Pallage or Kerestine was competent to charge the appellants since neither witness saw them sign and neither showed knowledge of the appellant's handwriting. If Mr. and Mrs. Novick did sign a complaint against Gouldsberry, there is nothing to show that they did not believe Gouldsberry was guilty of an assault upon Carroll and by signing a complaint against Gouldsberry they only put in motion an inquiry. Whether they put that inquiry in motion or whether it was put in motion by someone else, the fact remains that Gouldsberry was tried and convicted, and there is no testimony that either Novick testified in Gouldsberry's trial. It seems apparent that ratification could not be based upon the signing of those complaints.

Third: Testimony relative to an oral statement alleged to have been made by William H. Novick.

The only applicable statement claimed to have been made appears on page 37 of the transcript. There Mr. Gouldsberry testified as to a conversation with Novick on the Monday morning after Gouldsberry's

trial in the Municipal Court, to this effect: "He wanted to know, he said 'What's the matter with you Gouldsberry? Are you crazy? If I had been there I would have broken your Goddam neck. * * *'" Novick denied the statement as Gouldsberry had related it. (Tr. p. 95.) Assuming that Novick did make that statement exactly as Gouldsberry testified, we confidently assert it did not constitute ratification. It was made immediately after the trial at which Gouldsberry was found guilty, and did not indicate any intention of Novick to take upon himself any error which was made in that trial. It was simply a comment based on what Novick believed were the facts.

The general principles of ratification are stated in *Labatt (Master and Servant)*, Second Edition, Vol. 7, page 7896, and in 15 *Am. Jur. (Damages)*, page 37, Section 289. These authorities say in almost the same words:

"On general principles to authorize an inference of ratification it must appear that the party ratifying had knowledge of all the facts and circumstances attending the transaction or that he had an intention to take upon himself, without inquiry, the risk of any improper act as his own."

So in the instant case we submit that there was not sufficient evidence of ratification, either in the alleged statement of Novick or his retention of Carroll in his employ for a short time; and the Court should have granted appellants' motion for a new trial on the ground of insufficiency of the evidence.

**THERE WAS PREJUDICIAL ERROR IN THE
COURT'S INSTRUCTIONS.**

First. In defining “within the scope of employment” and submitting to the jury the question whether Carroll’s acts were within the scope of his employment.

Second. In instructions as to ratification: In advising the jury that they were the sole judges of what constitutes ratification; in failing to define ratification; in failing to point out to the jury any conditions limiting the kind of acts subject to ratification; in failing to point out to the jury the necessary elements of acts of ratification; and in designation of testimony to be considered by the jury as showing ratification.

Third. In giving ambiguous Instruction No. 4.

Fourth. In including among items which the jury could consider in determining compensatory damages, “incarceration in jail.”

Argument will be addressed to these points under the numbers above.

First: Scope of employment.

Restatement of the Law of Agency, Chapter 7, Section 228, defines this phrase as follows:

“Conduct of a servant is within the scope of employment if, *and only if*: (A) It is of the kind he is employed to perform * * * (C) is actuated at least in part by a purpose to serve the master. * * *” (Emphasis added.)

The requisite element required by “(C)” is entirely omitted in the Instruction given by the Court,

and this omission is important when, as here, the trial judge left to the jury the determination of whether the battery was or was not within the scope of the servant's employment. The sufficiency of the evidence in this connection is discussed above under the heading "The servant was not acting within the scope of his employment".

In this connection, Restatement of the Law of Agency, in a comment as to Section 235, says: "Outrageous acts may indicate that the servant is not actuated by an intent to perform his master's business," citing, for California, the following cases: 168 Cal. 715, 144 Pac. 961; 42 Cal. App. 606, 185 Pac. 694; 58 Cal. App. 587, 209 Pac. 85; to the same effect, *Williams v. Pulman Co.*, supra.

The Court instructed correctly (Inst. 5 C., Tr. p. 122): "An act cannot be said to be within the scope of the employment, where the employer himself, if present, would have no authority to do the act". The jury found punitive damages therefore they must have found that Carroll's acts were wilful or malicious (Inst. 6, Tr. p. 105), and it follows that neither of the appellants would have had authority to commit those acts and they were therefore not within the scope of Carroll's appointment.

Considering the evidence given and the character of the act, and the fact that the burden of proof, as the Court instructed, was on the plaintiff, appellants urge that the Court should have instructed the jury that Carroll was not acting within the scope of his em-

ployment, and left the appellants' liability to rest upon ratification, if any.

“Where there is no dispute as to the facts and they are susceptible of but one inference, the question (scope of employment) is one of law and should not be submitted to the jury.”

39 *C. J.*, page 1363, “Master and Servant”,
Section 1593.

Second: Instructions as to ratification.

The Court erred in instructing the jury (Inst. 5, Tr. p. 104): “What constitutes ratification is a question of fact for the jury to determine”. We respectfully urge that the elements which constitute ratification are for the Court to decide, and it should have instructed the jury as to those elements. Whether those elements were present or not was a question of fact for the jury to determine only if the evidence was conflicting.

Restatement of the Law of Agency, Volume 1, Chapter 4, page 197, section 82, gives this definition of ratification:

“Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act as to some or all persons is given effect as if originally authorized by him.”

In order to constitute one a wrongdoer by ratification, the original act must have been done in his interest or have been intended to further some purpose of his own. Cooley on Torts 127.”

39 *C. J.* 1266, "Master and Servant," Section 1448, "Ratification by Master", sets forth the requirements of ratification as follows:

"There can, of course, be no ratification unless the act was done for the master or at least purported to be done for him. The ratification must be with full knowledge of the tortious character of the act. Ratification of an unauthorized and unlawful act can be inferred only from the acts which evince clearly and unequivocally the intention to ratify and not from acts which may be readily and satisfactorily explained without involving such intention.²² The mere retention in the employment of the servant who has been guilty of the wrongful act complained of does not amount to ratification of his act so as to impose liability on the master, even though the master had knowledge of the servant's wrongful act, but it has been held that this amounts to some evidence of ratification. On the other hand, if the master, with knowledge of the wrongful act, accepts the benefits thereof, there is a ratification which renders him liable."

See also quotation from

Labatt (Master and Servant), 2d Ed., Volume 7, page 7896, *supra.*

To the same effect,

15 *Am. Jur.* 731, *Damages*, Section 289.

²²Cities, *Voss v. Baker*, 28 Fed. Cas. No. 17012; 1 Cranch. CC 104; *Lightner Mining Co. v. Lane*, 161 Cal. 689, 120 Pac. 771; and cases from Connecticut, Illinois, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, New York, Pennsylvania, Texas and Wisconsin.

In *Dillingham v. Anthony*, 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139, the Chief Justice propounds this question:

“If there were no other ground on which appellants could be held liable for actual damages resulting from the injuries received by appellee from the battery made upon him by the conductor *than that they had ratified his act*, could their liability be fixed on that ground however clear their subsequent approval of his act might be made to appear? ‘In order to constitute one a wrongdoer by ratification, the original act must have been done in his interest or intended to further some purpose of his own.’ * * * In the case before us there can be no pretense that the act of the servant was done in the interest of appellants, under a pretense of authority from them or to further any interest of themselves or the corporation whose business and property they were controlling, and *there was no ground on which to base ratification which is but an agreement express or implied by one to be bound by the act of another performed for him.*” (Emphasis added.)

One of the principles of the citations above was announced in *Sullivan v. People’s Ice Corp.*, 92 Cal. App. 764, an assault case in which there was a verdict for plaintiff, which was affirmed. In the opinion, written by Judge Sturtevant, it is said:

“The law is well laid down in distinct terms in the passage from the 4 Inst. 317, ‘he that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit, and then his

agreement subsequent amounteth to a commandment.' The question of liability by ratification depends upon this, whether the act was originally intended to be done to the use or for the benefit of the party who is afterwards said to have ratified it."

Justice Clifford, in *Supervisors v. Schenck*, 5 Wall. 772, 782, 18 L. Ed. 556, discussing ratification of acts of agents done in excess of authority, says:

"Such ratification may be by express consent, or by acts and conduct of the principal *inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name.*" (Emphasis added.)

None of the testimony to which the Court directed the attention of the jurors in connection with ratification could amount to ratification within the above principles.

Retention in employment has been held to be some evidence of ratification, but the rule as to that situation is set forth in 35 Am. Jur., 998, "Master and Servant," Sec. 563, as follows:

"Where the evidence shows that the employee's wrongful act was one which served the personal interest of the employee and could not have appertained to the employer's business, the defendant cannot be found liable because he retained the wrongdoer in his employ." (Citing *Everingham v. Chicago B. & Q. R. Co.*, 148 Iowa 662, 127 N. W. 109, Ann. Cas. 1912C 848; *Kwiechen v. Holmes & H. Co.*, 106 Minn. 148, 118 N. W. 668,

99 L.R.A. (N.S.) 255; *Wells v. Robinson Brothers Motor Co.*, 153 Miss. 415, 121 So. 141; *Mandel v. Byron*, 191 Wis. 446, 211 N. W. 145.)

In *Kastrup v. Yellow Cab Co.*, supra, the trial Court charged the jury that:

“if the servant of defendant acted without the scope of his authority when ordering plaintiff to descend from the car they should find for the defendant ‘unless you should further find from the evidence that the defendant after full notice of the conduct of its employee, ratified the same by retaining him in its employment, in which last case you will find for plaintiff.’”

Of which the Supreme Court of Kansas said:

“This charge, we think, was erroneous. We are not prepared to hold that the performance of a wrongful act by a servant, for which his employer for any reason is not liable at the time the act is committed, shall become the act of the employer afterwards, simply because he refuses to discharge the servant from his employment.”

It will be noted that the Kansas Court, in charging the jury, put in the qualification “after full notice of the conduct of its employee,” which was never given anywhere as a condition by the trial judge in the instant case; and, while in the instant case, the trial judge did not go as far as the Kansas judge when he said “ratified the same by retaining him in its employment,” still the effect, so far as the jury was concerned in the instant case, must have been just the same as the Kansas judge’s instruction. No limi-

tation of any sort was placed upon the direction to the jury that the mere fact of retention in employment might be sufficient evidence of ratification to bind the appellants. There was no evidence upon which the jury could have fairly found that the act of Carroll was ratified if the Court had properly instructed them as to the qualifications surrounding ratification as indicated above, and there was no testimony upon which the Court should have based an instruction upon the theory of ratification, since it is plain from the testimony that the Novicks could not be held to have been liable through ratification.

Adverting to the testimony which was indicated by the judge as applicable to the question of ratification, to-wit, "the testimony of the alleged signing of complaints against the plaintiff," those were criminal complaints. The Novicks were not seeking to gain any benefit, financial or otherwise, for themselves, even if they had signed those complaints, and their action in that respect would not have been "inconsistent with any other hypothesis than ratification". The facts were plain before the Court that Gouldsberry was not prosecuted upon any complaint signed by them, and the Court had no evidence before it upon which to base its instruction in that respect.

Third: Ambiguous and obscure instruction.

The Court's instruction No. 4 (Tr. p. 101) is erroneous not only because it assumes evidence by William Carroll, a person who did not testify, but also because it might be construed as an unrestricted

authorization to find a verdict for plaintiff against all the appellants. Without any differentiation between the liability of employer and the tort feasant servant the Court instructs that if the jury find that certain acts were done by Carroll, "then it will be your duty to find for the plaintiff against one or more of the defendants, in harmony with these instructions such damages as you may find from the evidence the plaintiff suffered" * * *

There is no comma between the parenthetical clause "in harmony with these instructions" and the words "such damages" and the clause could be construed to modify "such damages." The clause could also be referred to and modify the words "for the plaintiff." Neither of these allocations would do violence to grammatical construction. Granting that the Court may have intended to instruct a verdict against Carroll only, yet he owed a duty to these appellants to so word his instruction that the jury could not consider it an instruction to find against appellants.

Fourth: Error in instructing as to the elements of damages.

The Court instructed (Inst. 8, Tr. p. 105) that if entitled to damages the plaintiff might "recover for physical pain and mental anguish he endured, if any, as a result of the alleged assault and battery, *and his incarceration in jail* as well as * * *."

This instruction ties in closely with that in Instruction 5 inviting the jury to consider signing of criminal complaints as evidence of ratification, and we confidently assert it is erroneous, for the reason that it

authorizes the plaintiff to recover in this action damages he could not have recovered in a direct action against any of these defendants, and especially the appellants, for malicious prosecution, false imprisonment, or conspiracy to maliciously prosecute or falsely imprison.

It is elemental that to recover damages by direct action in such cases the fact of conviction is a complete and effective bar to recovery.

34 *Am. Jur.* 720, "Malicious Prosecution,"
Sec. 29.

Reasonable cause is also a bar. Another reason that the Court's instruction is wrong is because there is no recognition of the rule of proximate cause and intervening cause. The evidence here shows that Gouldsberry's actions on the street were the cause of one complaint and conviction, and also that there was ample opportunity during his resistance to the police for him to have broken his ankle. (Tr. pp. 64, 83, 84.) No instruction was given to cover these matters.

So far as counsel's search has gone, no case has been found that even squints at allowing a plaintiff to enter by the back door and get what the law would not give him if he entered by the front door. The undisputed facts that were before the Court negative Gouldsberry's right to such damages.

If the instruction referred to was as we think plainly wrong, it was vital for the reason that the jury gave both compensatory and punitive damages and

no one can tell to what extent or in what amount they were awarded because of this wrong instruction.

It is true no objection was directly made to the instruction as given but there was objection to the general instruction as to ratification and as to the whole of Instruction 5, with which this Instruction 8 ties in. In any case we urge that it was a plain prejudicial error and should be noticed as such.

In conclusion, we respectfully urge that the judgment in this case should be reversed, first, because there was not sufficient evidence to warrant the jury's verdict against appellants for either compensatory or punitive damages and, second, because the Court's instructions were prejudicially erroneous as above indicated.

Dated: August 11, 1948.

Respectfully submitted,

R. E. BAUMGARTNER, and
GEORGE B. GRIGSBY,

Attorney for Appellants.

E. COKE HILL,
Of Counsel.



No. 11,869

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM H. NOVICK and ANNETTA
NOVICK,

Appellants,

vs.

ANSON E. GOULDSBERRY,

Appellee.

Upon Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

EDWARD V. DAVIS,
WILLIAM W. RENFREW,
DAVIS & RENFREW,

Anchorage, Alaska,

Attorneys for Appellee.

FILED

DEC 1 1940

PAUL P. O'BRIEN,

Subject Index

	Page
Statement of basis for jurisdiction.....	1
Statement of the case.....	3
Questions involved	8
Summary of argument	8
Argument	
1. As to overruling of William Novick's motion for directed verdict	
A. Waiver	11
B. Failure to raise in lower court	11
C. Excessive damages	13
2. As to overruling of Annetta Novick's motion for directed verdict	
A. Waiver	11
B. Failure to raise in lower court	11
C. Excessive damages	13
3. As to denial of motion for new trial	
A. Not before court	13
B. No abuse of discretion shown	13
C. Joint motion by all defendants including one admittedly not entitled to new trial	14
D. Motion for new trial was properly denied	
(1) Annetta Novick was present and took part in the assault and was liable as a principal	14
(2) Carroll was acting in scope of employment	
(a) Alleged in complaint	16
(b) Not denied in answer	16
(c) Allegations of answer show Carroll was acting within the scope of his employment	16
(d) No testimony that actions of Carroll were outside scope of his employment	16

	Page
(3) Jury could properly have found William Novick ratified actions of Carroll	19
4. Appellants are not entitled to object to the sufficiency of instructions numbered 4, 12 and 13	
A. No objection taken or exception save in trial court	21
B. Instruction 4 is not ambiguous	22
C. Giving of instruction 8 was not "plain judicial error"	22
(1) Doctrine of "plain judicial error" applies only in criminal cases	23
(2) Instruction 8 was proper on the measure of damages	23
(a) The action was one for assault and battery, not for false imprisonment or malicious prosecution	23
(b) Appellants made no objection to the pleadings or to the evidence concerning the arrest and incarceration of appellee..	23
(c) The jury could properly consider the evidence offered in measuring the appellee's damages	24
5. Appellants are not entitled to question instruction number 5 as given by the court	
A. Exception made to instruction 5 as given was waived on the giving of instruction 5-C without objection or exception	24
B. Instruction 5 read as a whole and with the other instructions and in view of the evidence was proper	25
6. Giving of instruction 6 was not error	
A. The portion of instruction 6 objected to by appellants was not assigned as error nor discussed in appellants' brief	25

Page

B.	The portion of instruction 6 claimed to be objectionable was justified by the evidence read with the rest of instruction 6 and with all the instructions and in the light of the evidence, the giving of such portion was not error, or if error, was harmless error	27
7.	Refusal to give appellants' requested instructions was not error	
A.	No objection was made to such refusal and exception taken was general as to all five requested instructions and did not point out specific objections or alleged errors in such refusal	27
B.	The requested instructions were either improper or not based on any evidence before the jury or were given in substance in the charge of the court	29

Table of Authorities Cited

Cases	Pages
Arthur C. Harvey v. Malley, 288 U.S. 415.....	21
Bank of Italy v. Romero & Co., Inc., 287 Fed. 5, 7.....	12
Beatson Copper Company v. Pedrin, 217 Fed. 43.....	21
Borderland Coal Sales Co. v. Imperial Coal Sales Co., 7 F. (2d) 116	22
Chicago M. & St. P. Ry. Co. v. Harrelson, 14 F. (2d) 893 896	29
Copper River & N. W. Ry. Co. v. Reeder, 211 Fed. 280.....	13, 21
Fairmont Glass Works v. Cub Fork Coal Co., et al., 287 U.S. 474, 482, 485	13
Forno v. Coyle, 75 F. (2d) 692, 695.....	13
Frederick v. United States, 163 F. (2d) 536, 539.....	12
Fulkerson et al. v. Chisna Min. & Imp. Co., 122 Fed. 782, 784	11
Hall v. Aetna Life Ins. Co., 85 F. (2d) 447, 451.....	28
Hansen v. Boyd, 161 U.S. 397, 402.....	12
Hazeltine v. Johnson, 92 F. (2d) 866, 868-9.....	24
Heskett et al. v. United States, 58 F. (2d) 897, 901-902.....	11
Ito v. U.S., 64 F. (2d) 73, 77.....	22
Partridge v. Boston & M. R. Co., 184 Fed. 211, 215-216.....	29
Pennsylvania Casualty Company v. Whiteway et al., 210 Fed. 782, 784	12
Pennsylvania R.R. Co. v. Minds, 250 U.S. 368.....	12, 28
Phoenix Ry. Co. v. Landis, 231 U.S. 578, 582.....	22
Runkle v. Burnham, 153 U.S. 216, 222.....	11
Sharples Separator Co. v. Skinner, 251 F. 25, 26-27.....	12
Union Pacific Railway Co. v. Daniels, 152 U.S. 684, 687-688	11
United Verde Copper Co. v. Jaber, 298 F. 97.....	12
Western Fire Ins. Co. of Fort Scott, Kan. v. Word et al., 131 F. (2d) 541, 543	22

TABLE OF AUTHORITIES CITED

v

Statutes	Page
Act of June 6, 1900, 31 Stat. L. 321, as amended 35 Stat. L. 839, 840; C.L.A. 1933, Section 1091.....	2
28 U.S.C.A., Section 225 (Judicial Code, Section 128) as amended	2

Texts

3 American Jurisprudence, Appeal and Error, Section 378, and 1947 Pocket Part same volume and section.....	22
--	----

No. 11,869

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILLIAM H. NOVICK and ANNETTA

NOVICK,

Appellants,

VS.

ANSON E. GOULDSBERRY,

Appellee.

Upon Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

STATEMENT OF BASIS FOR JURISDICTION.

The judgment which is the basis of this appeal was rendered June 30, 1947, by the District Court for the Territory of Alaska, Third Division, in favor of the plaintiff, appellee herein, and against four defendants jointly and severally (Tr. pp. 18-19). Two of the defendants are the appellants herein. The other defendants have not joined in the appeal. The judgment is in the sum of two thousand five hundred dollars for compensatory damages plus one thousand dollars punitive damages and for plaintiff's costs and disbursements (Tr. p. 19). The action upon which the judgment was based concerned an alleged assault

upon appellee occurring on July 5, 1946, at Seward, Third Division, Territory of Alaska (Tr. pp. 2-7). On July 5, 1946, and thereafter to and including the filing of the action, and to the time of trial, all of the parties to the action, were residents of Seward, Alaska (Tr. pp. 31, 65, 66, 69, 70, 77, 79).

The District Court for the Territory of Alaska is a Court of general jurisdiction. Act of June 6, 1900, 31 Stat. L. 321, as amended 35 Stat. L. 839, 840, C.L.A. 1933, Sec. 1091, which reads in so far as here material,

“There is established a District Court for the Territory of Alaska * * * with general jurisdiction in * * * civil causes.”

Such District Court had jurisdiction over defendants, including appellants, by reason of personal service of process upon them and by their general appearance in the action first by demurrer, then by answer (Tr. pp. 8, 9-15).

This Court has jurisdiction by virtue of the provisions of Sec. 225, Vol. 28, U.S.C.A. (Judicial Code, Sec. 128) as amended, the pertinent provisions of which are:

“The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions * * * Third. In the District Courts for Alaska, or any division thereof * * * in all cases.”

STATEMENT OF THE CASE.

Complaint in the cause from which this appeal arises was filed November 20, 1946, in the District Court for the Territory of Alaska, Third Division (Tr. p. 7). Defendants, including appellants, appeared generally by demurrer and demurrer was overruled (Tr. p. 8). All defendants including appellants, jointly answered the complaint (Tr. pp. 9-15), and all defendants were represented by the same attorney (Tr. p. 14). Plaintiff replied to the answer (Tr. p. 15).

Trial of the cause was commenced March 26, 1947, at Seward, Alaska, before the Honorable Anthony J. Dimond, Judge and a jury duly impanelled and sworn (Tr. p. 31).

Plaintiff was present at the trial in person and by counsel. All defendants likewise were present at the trial and represented by counsel (Tr. p. 31).

At the trial plaintiff and Henry J. Pallage testified on plaintiff's behalf and plaintiff rested his case (Tr. pp. 31-50). Thereupon Joseph M. Hamilton, Patrick J. Friede, Charles Ottoson, Charlie C. Peterson, Peter P. Kerestine, and defendants Annetta Novick, Mrs. Lucille Carroll, and William H. Novick testified on behalf of defendants (Tr. pp. 50-79) and the defense rested (Tr. p. 79).

Defendant William Carroll was personally present in Court (Tr. pp. 31-79) but didn't testify.

Mr. Gouldsberry testified in rebuttal (Tr. pp. 80-81) and then plaintiff's case in chief was reopened

and Irvin L. Metcalf and Dr. J. H. Shelton testified for plaintiff (Tr. pp. 81-84).

Thereupon appellants William H. Novick and Annetta Novick and defendant Lucille Carroll moved for an instructed verdict on the ground of insufficient evidence (Tr. p. 84) and the motion was argued (Tr. pp. 84-88). The motion was by the Court overruled (Tr. p. 88). The defendants then introduced testimony by witnesses Thomas E. Howell, Peter P. Kerestine, William H. Novick and Mrs. Annetta Novick (Tr. pp. 88-96).

After defendants rested their rebuttal Henry J. Pallage testified in rebuttal for the plaintiff (Tr. pp. 96-99) and both sides rested (Tr. p. 99). Both parties introduced evidence in the cause after appellants' motion for directed verdict and had been overruled (Tr. pp. 88-99). Appellants did not renew their motion for directed verdict at the close of all the evidence (Tr. p. 99) or thereafter (Tr. pp. 99-122).

At the close of the evidence the Court instructed the jury (Tr. pp. 99-112). Defendants, including appellants, excepted generally to failure to give their requested instructions but did not specify any grounds of objection nor did any of the defendants state distinctly or otherwise the grounds of their objection to the failure of the Court to give the requested instructions (Tr. pp. 114-115, 118). The defendants excepted to instruction number five as given by the Court on the specific ground that the term "within the scope of employment" was used too frequently

without defining the phrase (Tr. pp. 112-113). Later the Court by instruction 5-C defined "scope of employment" for the jury (Tr. p. 122). None of the defendants excepted to instruction 5-C as given, nor did they in any manner indicate to the Court that such instruction did not meet the objection they had made to instruction 5 (Tr. p. 122).

At the request of the plaintiff the Court added additional language to instruction number 6 (Tr. pp. 119-120). Defendants excepted to the addition made to instruction 6 and limited their exception to such addition (Tr. p. 120). The exception was based on the specific ground that the jury might feel that retention of defendant Carroll in the employment of appellants might constitute ratification of Carroll's acts, and that such retention wouldn't constitute ratification (Tr. pp. 119-120). No objection was made and no exception was taken by any of the defendants to any of the instructions as given by the Court either in whole or in part except as above set forth.

After verdict but before judgment appellants made motion for new trial and the motion was denied. Appellants excluded motion for new trial from the printed transcript (Tr. p. 135).

Assignment of errors made by appellants in this cause are based on several grounds as follows:

1. Overruling of motion for directed verdict made by appellants and defendant Lucille Carroll (Tr. p. 23).

2. Alleged abuse of discretion in overruling motion for new trial (Tr. pp. 23-24).

3. Alleged error in giving a portion of instruction five such portion being set out verbatim (Tr. pp. 24-25).

4. Alleged error in refusing to instruct the jury as requested in defendants' requested instructions one to five inclusive (Tr. pp. 25-29).

In their statement of points on appeal appellants designate additional alleged error in the Court's giving of a portion of instruction 4 (Tr. pp. 131-133) and in giving instruction six (Tr. pp. 133-134).

In their brief appellants designate an additional alleged error in the giving of a portion of instruction number 8 (appellants' brief p. 14) and a portion of instruction number 9 (appellants' brief p. 15). These alleged errors were not raised prior to the brief either by objection, exception, assignment, statement of points or otherwise.

In general appellee concurs in the statement of facts made by appellants with certain exceptions herein set forth.

Appellee does not concur in the statement (appellants' brief pp. 3-4) concerning the movements of Mrs. Novick and what she says she found on arriving in the bar and as to what she did there. Appellee alleges that Mrs. Novick was present in the bar from the beginning of the altercation and that she actively participated in the assault as testified by appellee (Tr. pp. 32, 34, 43, 44, 48, 49).

It is undisputed as alleged in appellants' brief (p. 3) that before July 5, 1946, appellee had "slapped Carroll over", but it is likewise undisputed that at the time of the "slapping over", Carroll was carrying on an improper course of conduct with appellee's wife, in a public place on the streets of Seward, Alaska (Tr. p. 40).

Statement in appellants' brief (p. 4) to the effect that it is undisputed that Mrs. Carroll and Gouldsberry began to quarrel is not accurate. That matter is disputed.

Referring to the last line of the first paragraph on page 4 of appellants' brief, appellee asserts there is nothing in the record to merit the language there used.

Technically appellants are correct in their statement (last paragraph p. 4, brief) to the effect that Gouldsberry's testimony about commencement of the fight conflicts with the testimony of every other witness who testified on the subject. Actually no other witness testified on the subject except Mrs. Carroll.

Charlie Peterson went out and found a policeman as appellants have said. He apparently went as a result of a request by Annetta Novick ("I kept asking people— somebody to please call Pete or Bill, find Bill") (Tr. p. 67).

Appellants' statement that all the witnesses but plaintiff testified plaintiff was trying to get back into the bar when the policeman came is incorrect. Mrs. Novick is the only one who so testified.

Appellee submits there is nothing in the record as to whether appellee appealed or did not appeal as alleged in the last line of page 5 of appellants' brief.

QUESTIONS INVOLVED.

1. Have appellants presented any record in this matter entitling them to relief in this Court?

Raised by the entire record presented including particularly objections made and exceptions taken at the trial, assignment of errors, designation of points and alleged errors raised for the first time in appellants' brief.

2. Assuming that the record presented by appellants is technically sufficient to entitle appellants to relief, have appellants demonstrated substantial prejudicial error in the proceedings before the trial Court so as to require a reversal of the judgment rendered by that Court?

Raised by the entire record on appeal.

ARGUMENT.

Appellants in this matter are not entitled to raise the matters contained in certain of their specifications of error as follows:

1. As to the overruling of Willian Novick's motion for directed verdict for the reason that evidence on behalf of both parties was offered and

admitted after such motion was overruled and such motion was not renewed at the close of the trial or at all after receipt of the additional evidence, and for the further ground that the motion in question had no reference to damages, excessive or otherwise.

2. As to the overruling of Annetta Novick's motion for directed verdict for the same reason as set out in the preceding paragraph.

3. As to denying motion for new trial for the reason that the motion for new trial is not before this Court, the motion having been expressly deleted from the record by direction of appellants, and for the further reason that such motion and the papers in support thereof, are not included in the bill of exceptions.

4. As to the giving of a portion of instruction number 4 as set forth in appellants' specification number four for the reason that no objection was made or exception taken to instruction number four or any part thereof by appellants at the trial. Neither was any assignment of error made concerning the giving of such instruction or any portion thereof.

5. As to the giving of a portion of instruction number 5 as set forth in appellants' specification number five for the reason that no objection was made or exception taken to instruction number five or any part thereof by appellants at the trial,

except that it failed to define "within the scope of employment" and such error if it was error was cured by the giving of instruction 5-C defining "scope of employment" without objection by appellants.

6. As to the giving of instruction number six except as to the language "unless the jury finds by a preponderance of the evidence that the employer has ratified the acts of his employee as hereinbefore explained", for the reason that the only objection made or exception taken to instruction number six at the trial was specifically limited to the quoted language, and as to the giving of the instruction number six for the reason that no error was alleged in the giving of instruction number six in appellants' assignment of errors.

7, 8, 9, 10, 11. As to refusal of the Court to instruct the jury according to defendants' requested instructions numbered 1 through 5 inclusive for the reason that the exceptions taken to such refusal were merely general exceptions without pointing out reasons or specific objections to such refusal or as to why such requested instructions should have been given, and for the further reason that as will appear from instructions given and the requested instructions the requested instructions were either improper as not being based on any evidence in the case, or were improper as requesting the Court to invade

the province of the jury as to the facts or were given in substance in the charge given the jury by the Court.

12, 13. As to giving that portion of Instruction number 8 and that portion of Instruction number 9 quoted under appellants' specification numbered 12 and 13 for the reason that no objection was made or exception taken to either of such instructions or any part thereof at the trial, and for the further reason that these points have never been raised prior to appellants' brief either by assignment, designation or otherwise.

Appellants by introduction of evidence after denial of their motion for directed verdict waived such motion and the exception taken to its denial and are not entitled to assign such denial as error on this appeal.

Union Pacific Railway Co. v. Daniels, 152 U. S. 684, 687-688;

Runkle v. Burnham, 153 U. S. 216, 222;

Fulkerson et al. v. Chisna Min. & Imp. Co., 122 Fed. 782, 784 (9th Circuit arising from Alaska);

Heskett et al. v. United States, 58 F. (2d) 897, 901-902 (Ninth Circuit).

Appellants are not entitled to assign as error the claimed insufficiency of evidence to justify the verdict having failed to raise that point by appropriate motion at the close of the evidence.

In

Hansen v. Boyd, 161 U.S. 397, 402,

Mr. Justice White says:

“This assignment is of course without merit, since it asks us to determine the weight of proof and thus usurp the province of the jury. There was no motion made at the close of the evidence to direct a verdict, and both parties therefor agreed to the submission of the issues of fact to the consideration of the jury. In the absence of such a request, we must assume that there was sufficient evidence to warrant the Court in permitting the jury to draw the inferences proper to be deduced from the evidence of the case.”

Pennsylvania Casualty Company v. Whiteway, et al., 210 Fed. 782, 783-784 (Ninth Circuit).

“When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction and an exception taken to the ruling of the Court.”

Bank of Italy v. F. Romero & Co., 287 Fed. 5, 7 (Ninth Circuit Court);

United Verde Copper Co. v. Jaber, 298 F. 97 (Ninth Circuit Court);

Sharples Separator Co. v. Skinner, 251 F. 25, 26-27 (Ninth Circuit).

See also

Frederick v. United States, 163 F. (2d) 536, 539 (Ninth Circuit).

Appellants in their first specification of error (appellants' Brief p. 6) alleges error that the verdict of the jury was for excessive damages. No motion to or ruling of the Court in that connection is before the Court. Neither is the point discussed or argued in appellants' brief. Appellee assumes such specification has been waived and may be disregarded.

Forno v. Coyle, 75 F. (2d) 692, 695 (Ninth Circuit).

The bill of exceptions (Tr. p. 123) shows that defendants filed a motion for new trial, that the motion was denied, and exception allowed. Neither the motion nor the documents in support thereof, nor the order of the Court thereon, are included in the bill of exceptions. Granting or refusal to grant a motion for new trial is in the sound discretion of the Court. Since the grounds of the motion and the reasons for the Court's ruling thereon are not before this Court, it cannot be said as a matter of law that the trial Court manifestly abused its discretion in denying the motion for new trial.

Fairmont Glass Works v. Cub Fork Coal Co., et al., 287 U. S. 474, 482, 485;

Copper River & N. W. Ry. Co. v. Reeder, 211 Fed. 280, 286 (Ninth Circuit arising from Alaska).

If it be argued that the motion for new trial was upon the ground that there was no substantial evidence to justify the verdict against either of the defendants William H. Novick and Annetta Novick as

it is alleged in appellants' third specification of error, appellee contends that upon the record which is before the Court, the motion was properly denied. The motion was made jointly by all the defendants, including William Carroll (Tr. pp. 24 and 123). Appellants concede in their brief (p. 18) that the verdict was proper as against Carroll. Thus a joint motion for new trial by all the defendants was properly denied on that ground alone.

In addition there is not only substantial evidence but ample evidence that appellant Annetta Novick personally took part in the assault on plaintiff. The Court in instructions 3 (Tr. p. 100) defines an assault and in instructions 3-a (Tr. p. 101) instructs that one participating in an assault or an assault and battery is liable as a principal.

The complaint alleges (Par. V Tr. p. 3) that appellant Annetta Novick was present at the time in question. The answer (Par. III Tr. p. 9) denies the presence of appellant Annetta Novick while plaintiff was seated at the bar and alleges that at all times while plaintiff was seated at, or standing near, the bar, Annetta Novick was in an adjacent store, and in Par. V (Tr. p. 12) alleges that "Annetta Novick did not then or any other time so much as touch the plaintiff, but only made every effort to persuade him to cease beating the defendants mercilessly". The evidence is conflicting as to when Annetta Novick arrived at the scene of the conflict, running all the way from her statement that she dashed into the bar when she heard

a racket to see what it was all about (Tr. p. 66) to appellee's testimony that she was there from the beginning and throughout the fray (Tr. pp. 32, 34, 43, 44, 48, 49). The evidence likewise is conflicting as to what part Mrs. Novick took in the matter, but it is undisputed that she helped to drag or push plaintiff to the door when he got off the floor. See appellee's testimony (Tr. p. 34, 43, 44, 48). See also Mrs. Novick's testimony (Tr. p. 66, 67, 69, 95, 96). It is undisputed that she sent for the police (Tr. p. 67) and that when the chief of police came he took no one except appellee, apparently with the full consent of Annetta Novick (Tr. p. 67). This is enough to illustrate that there was ample evidence that Mrs. Novick personally and actively took part in the matter. The jury heard the evidence. The jury had the right and the duty to evaluate the testimony and the credibility of the various witnesses. The jury under the Court's instructions by its verdict could have found and no doubt did find that Annetta Novick was liable for the assault and battery and all its consequences as a principal. The verdict is binding on the appellant Annetta Novick and this Court should not go behind that verdict.

Appellant William Novick was not personally present. Is there any substantial evidence to justify a verdict against him as against the motion for new trial? Appellee submits that there is not only some substantial evidence but ample evidence to support the verdict. The two Novicks were husband and wife

and co-owners and operators of Novick's Cocktail Lounge, apparently as partners. William Carroll was the employee in charge of the business.

The complaint alleges (Par. IV Tr. p. 3) that William Carroll during all times in question "was acting for and on behalf of the defendants William H. Novick and Annetta Novick and acting in the course of his employment as a servant and employee of such defendants", and again (Par. VI Tr. p. 3) that "William Carroll, acting as agent, servant and employee" of appellants "without cause or provocation unlawfully and unjustly assaulted and battered plaintiff", and (Par. VII Tr. p. 4) "William Carroll and Lucille Carroll and Annetta Novick beat plaintiff". Defendants' answer is verified by appellant William Novick. The answer nowhere specifically denies the agency of Carroll or that he was acting in the course of his employment or that he was acting for and on behalf of appellants, except insofar as the allegations of paragraph VI of the complaint are generally denied by paragraph IV of the answer (Tr. p. 10). Nowhere in the answer is any allegation made that Carroll at the time and place in question was not acting in the course of his employment or that he was not acting for and on behalf of appellants. Neither are any facts alleged in the answer from which it could be inferred that Carroll was acting outside the course of his employment. On the contrary it is alleged (Answer Par. IV Tr. p. 10) "that * * * Carroll, in order to protect his wife and himself and *to preserve the peace of the establishment of which he was in charge* (emphasis

supplied) did * * * etc.” and again (Answer Par. IV Tr. p. 11) “*and in doing so did not use any more force than was reasonably necessary * * * and to preserve the peace and protect other persons lawfully present*” (emphasis supplied) and (Answer Par. IV, Tr. p. 11) “if plaintiff sustained any injury or damage it was occasioned * * * *while defendant William Carroll was in the quiet and lawful discharge of his duties as bartender in complete charge of the said cocktail lounge*”. (emphasis supplied) and (Answer Par. VII Tr. p. 13) “*when plaintiff was arrested for the noise and disturbance that he was creating in said cocktail lounge*”, (emphasis supplied) “he was so wild and violent that the arresting officer required considerable assistance in the performance of his duty.” and (Answer Par. X Tr. p. 13) “or as a result of his violent behavior after being *forcibly removed* (emphasis supplied) from the cocktail lounge of defendants Novick.” * * * Nowhere in his testimony does appellant Novick allege that Carroll was acting outside the scope of his employment and there is nothing in his testimony from which the jury might have inferred Mr. Novick claimed Carroll was acting outside the scope of his employment (Tr. pp. 77-79, 94-95). Neither is there anything in the testimony of Annetta Novick to the effect that Carroll was acting outside the scope of his employment (Tr. pp. 65-69, 95-96).

Defendant William Carroll was present in Court but wasn't called as a witness. Had the Novicks been contending Carroll was not acting for them in the fracas or that he was acting beyond the scope of his

employment or from some personal motive he could have been called to testify as to his duties and the scope of his employment and as to how and why the assault was committed. He was not called.

The Court in instruction number 11 (Tr. p. 109), used the following language: "Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust."

Appellant William Novick, by answer verified by him, alleged facts which the jury properly could have construed as admissions of plaintiff's allegations that William Carroll in starting and in carrying on the assault upon plaintiff was acting for the masters Mr. and Mrs. Novick and in the course of his employment. Had Carroll been acting for himself and not for his masters and outside the scope of his employment evidence of that state of affairs could easily have been given by appellants. No such evidence was offered. It seems inescapable that the jury was entitled to find and did find that appellant William Novick was liable for the assault committed by his servant Carroll.

If Carroll was acting within the scope of his employment ratification of his acts would not be necessary to bind the masters Novicks and the matter of

ratification would become immaterial. Appellee contends the jury could and did find Carroll acted within the scope of his authority. However in addition appellee asserts there is ample evidence from which the jury could find ratification of Carroll's acts by William Novick. It may be, as appellants contend, that taken separately, none of the several acts of appellants after the altercation would constitute ratification, but taken together it seems inescapable that such acts might be evidence of ratification and that is as far as the Court went in its instructions (Inst. 5, Tr. p. 104). Appellants did retain William Carroll in their employment and on the whole record a claim that they did so without full knowledge of the facts seems unwarranted. The jury could properly have found and may have found that Annetta Novick was present throughout the fracas. It doesn't seem likely she didn't make full disclosure to her husband. Appellant Annetta Novick did cause the arrest of plaintiff, first by sending for the police, then by pushing him out the door into the arms of the police if her version is right or by having him arrested in the bar if plaintiff is right. The appellants may or may not have signed a criminal complaint against appellee. The jury properly could have found they did. Whether they did or whether they didn't, they took an active part in the proceedings and were personally present at the kangaroo Court when it is claimed plaintiff was convicted (Tr. pp. 93, 94). Plaintiff testified (Tr. p. 37) "I tried to make a defense at that time and they wouldn't let me talk. Mr. Kerestine, the chief of police, told

me to shut up my face and not beat my gums so much so I wouldn't say nothing. Mr. Novick was there on Monday morning. He didn't have anything to say regarding this case * * *'' (Tr. p. 36). "I was being discharged from the hospital. * * * That's the first I knew of it because when the Court was dismissed he didn't tell me I had a \$150.00 fine to pay for (or) 75 days in jail. That's the first I knew of it." Of those apparently present at that so-called trial, William Novick, Annetta Novick, Peter Kerestine, and Thomas Howell, all testified in this case for defendants. None of them disputed plaintiff's testimony that he was not allowed to defend himself and that he was not advised of his sentence. Defendants' attorney on the trial of this cause was also present at the police Court trial (Tr. p. 95). He did not dispute plaintiff's testimony as to what happened there. There is no evidence as to whether witnesses were sworn and testified in police Court. There is no evidence that complaining witnesses or Carroll were even ther. Whether appellants signed complaints or not, or if they did sign complaints whether they were used or not, is immaterial. Appellants did take an active part in a so-called judicial proceeding whereby plaintiff was railroaded to jail as a result of a disturbance in appellants' establishment which now appears by the verdict of the jury not to have been his fault.

It is disputed as to just what William Novick told plaintiff at police Court. The jury could properly have found that Mr. Novick intimated that had he

been present at the time of the fracas, that he would have dealt with plaintiff more harshly than Carroll did. Finally, over six months after the assault, Mr. Novick signed and swore to his answer alleging that what Carroll did was done to keep peace in the establishment and to protect other patrons of the bar and inferentially at least Mr. Novick adopted all that Carroll had done as being done in Novick's interest. The conclusion seems inescapable that if ratification is important, the jury could properly have found that William Novick ratified Carroll's acts and adopted them as his own.

Appellants' specification of errors numbers 4, 12, and 13 have to do with alleged errors in the Court's instructions numbered 4, 8 and 9 respectively. As previously shown no objection was made or exception taken to any of these instructions at the trial. (See Tr. pp. 114, 119-122) and this brief under statement of the case, (p. 6). Instructions given may not be reviewed on appeal unless objection is made, the ruling of the Court be had and exception to such instruction is saved at the trial.

Arthur C. Harvey v. Malley, 288 U. S. 415;

Copper River & N. W. Ry. Co., et al. v. Reeder,
Ninth Circuit, 211 Fed. 280 and cases therein
cited

and the Appellate Court is precluded from considering them under such circumstances.

Beatson Copper Company v. Pedrin, Ninth Circuit 217 Fed. 43 and cases therein cited.

An objection to the instructions of the Court to the jury not raised in the Court below but raised in the Appellate Court for the first time comes too late.

Phoenix Ry. Co. v. Landis, 231 U. S. 578, 582;

Ito v. U. S. (C.C.A. 9) 64 F. (2d) 73, 77;

Western Fire Ins. Co. of Fort Scott, Kan. v.

Word, et al., C.C.A. 5, 131 F. (2d) 541, 543.

See also

3 *Am. Jur. Appeal and error* Sec. 378 and cases there cited and cases cited in 1947 Pocket Part of the same work same Section number.

In passing, appellee wishes to point out that appellants (brief p. 37) claim instruction four is ambiguous and obscure because it is claimed there is no comma between "in harmony with these instructions" and "such damages". The language objected to is found at lines 16 and 17 of page 102 of the transcript. The comma is plainly evident in the copy of the transcript in the possession of the writer.

But, say appellants, the portion of instruction 8 objected to was plain judicial error and should be noticed despite the fact no objection was taken thereto at the trial. Appellee submits that the language used does not come within the purview of the doctrine of plain judicial error.

See,

Borderland Coal Sales Co. v. Imperial Coal Sales Co. (C.C.A. 6), 7 F. (2d) 116,

where the following language is used:

“An appellate Court can consider only errors to which objections have been made and exceptions taken in the trial Court. The only exception to this general rule is in criminal cases, where federal Courts of review may sometimes, in the exercise of sound judicial discretion, and to prevent miscarriage of Justice, notice error in the trial to which no exceptions or objections have been taken.”

The instant action manifestly is not a criminal case.

In any event the action upon which this appeal is based is neither one for false imprisonment nor for malicious prosecution nor for conspiracy to maliciously prosecute or falsely imprison. The action was one for assault and battery and the tortfeasors were liable for all damages proximately resulting from their tortious acts. The arrest and imprisonment were pleaded by plaintiff's complaint (Par. IX Tr. p. 4-5; Par. XII Tr. p. 6; Par. XIII Tr. p. 6) and responsibility therefor was denied by defendants' answer, but any defense in bar because of alleged conviction or a defense of probable cause was not raised until appellants' brief. Neither was any request made to strike the allegations from plaintiff's complaint or to exclude the testimony on that point nor to strike the testimony after it was given. It is now apparent from the record that plaintiff had no trial as our system of justice demands and that his so-called conviction was a farce. It is likewise now apparent from the record before the Court that no probable cause existed and that Annetta Novick knew probable cause did not

exist. If William Novick took the part which he took in this matter without full knowledge he is none the less liable as he should have investigated before proceeding as he did. This arrest and imprisonment arose out of the altercation in the bar and it now appears that the fault there was not appellee's but was defendants'. The court's instruction in this matter clearly said that the jury might consider that evidence if it wished in determining damages. Considering the entire instruction as given, and considering it in its relation to all the other instructions, it is apparent the instruction was proper.

Appellants' specification of error five relates to a portion of instruction five as given. As previously pointed out, appellants objected and excepted at the trial to instruction five on the specific ground that it didn't define "scope of employment" and on that ground only. The Court in response to such objection later gave instruction 5-C which defined scope of employment. No objection or exception was taken to instruction 5-C nor did appellants otherwise indicate to the Court that they were in any way dissatisfied with the action of the Court in that respect. The reason for the rule which precludes examination of matters not objected to in the trial Court is, as the Courts say, "in order to afford that Court a fair opportunity to pass upon the matter, and correct its own errors, if any".

Hazeltine v. Johnson, C.C.A. 9, 92 F. (2d) 866, 868-9 (citing cases).

Appellants in this case made a specific objection to instruction five, the Court corrected its error, if any, the appellants gave no indication that the action taken didn't meet their objection. They are not now entitled to complain.

A careful reading of the language in instruction five now complained of by appellants with the balance of such instruction and a reading of such instruction in connection with all the instructions and the evidence will disclose that such instruction was based on ample evidence and was entirely proper. If appellants wanted other or further instructions on the point in question they could have and should have requested them at the trial. They are too late now to complain.

Specification of error number 6 in appellants' brief has to do with instruction 6 as given by the Court. As shown by the transcript (Tr. p. 120) and appellants' brief (p. 11) appellants did not except to instruction six as a whole but only to certain language added to that instruction as follows:" * * * unless the jury find by a preponderance of the evidence that the employer has ratified the acts of his employee as hereinbefore explained." The language concerning ratification to which the instruction refers is contained in instruction five and as previously shown in this brief no objection was made or exception taken to that instruction except as to its failure to define "scope of employment". That objection was met by the definition of that term later given by the Court.

So far as appellee can determine, appellants' brief does not discuss instruction six except to list the giving of such instruction as a specification of error, (Brief pp. 10-11) and to mention such instruction under "questions involved" (brief pp. 15, 16). In the argument concerning ratification (brief pp. 25-28, 31-36) appellant makes no reference to instruction six but only to instruction five. Appellants' assignment of errors (Tr. pp. 23-28) does not assign as error the giving of instruction number six or any part thereof.

Since no objection was made or exception taken to any part of instruction six except a portion which states in general terms a proposition of law fully developed in instruction five to which no objection was made or exception taken, and since no assignment of error was made as to the giving of instruction six or any part thereof, and since no discussion or argument is had in appellants' brief as to why instruction six as given is not entirely proper, appellee feels that such specification of error can be disregarded. If appellee is wrong in that assumption, then appellee has previously fully argued the matter of ratification. Assuming that the law quoted by appellants concerning ratification is valid law under the facts of those particular cases, it is evident that the facts of this case are entirely different. It is evident here that there was competent evidence from which the jury might properly have found that Mr. Novick ratified Carroll's acts and that is as far as the instructions went. Appellee asserts that instruction six as given when read in the light of the evidence and in connection with the

other instructions, was proper, and that the Court committed no error in giving it. Appellee further asserts that the giving of the part of instruction six objected to by appellants, if it be considered error, was harmless error, in view of the fact that the proposition of ratification was covered in instruction five to which no objection was made or exception taken on that ground at the trial.

Appellants' specification of errors numbered seven through eleven, both numbers inclusive, have to do with the failure of the Court to give appellants' requested instructions numbered one through five, both numbers inclusive. Appellants' brief (pp. 15-17) under "questions involved" urges that certain questions are raised, by failure of the Court to give the requested instructions but no argument is had as to why the requested instructions should have been given or as to how failure to give such requested instructions was error.

Objection made and exception taken at the trial to the failure of the Court to give the requested instructions were in general terms. No attempt to point out specific objections or alleged errors was made. Such objections as were made and exceptions taken were not initiated by appellants. They were only made and taken upon the suggestion of the Court after appellants' attorney had completed his exceptions (Tr. pp. 114-115, 118).

General objections and exceptions made in the trial Court to refusal by the Court to give requested in-

structions do not raise any issue for action by an appellate Court.

See,

Hall v. Aetna Life Ins. Co. (C.C.A. 8), 85 F. (2d) 447, 451, where Sanborn, Circuit Judge said:

“The proper time to take exceptions to the instructions of the Court and to its failure to give requested instructions is at the termination of the charge and before the jury retires, and the exceptions taken should point out wherein the charge is erroneous, or deficient and what requested instructions or portions thereof have not, either in words or in substance, been covered by the charge as given. * * * The test should be whether, as a practical matter, the procedure followed called to the Court’s attention the specific omissions in the charge which are assigned as error”.

See also:

Pennsylvania R.R. Co. v. Minds, 250 U.S. 368.

In that case error was alleged on refusal of the Court to charge as requested. Mr. Justice Day for the Court said (p. 375):

“This Court has repeatedly held that objections to the charge of a trial Judge must be specifically made in order that he may be given an opportunity to correct errors and omissions himself before the same are made the basis of error proceedings; this is the only course fair to the Court and the parties. * * * Parties may not rest content with the procedure of a trial, saving general

exceptions to be made the basis of error proceedings, when they might have had all they were entitled to by the action of the trial Court had its attention been seasonably called to the matter.”

See also:

Chicago, M. & St. P. Ry. Co. v. Harrelson
(C.C.A. 8), 14 F. (2d) 893, 896;

Partridge v. Boston & M. R. Co. (C.C.A. 1),
184 F. 211, 215, 216.

In any event the Court committed no error in failing to give the requested instructions.

To have given requested instruction number 1 as requested would have required the Court to instruct as to a defense which was neither raised by the pleadings nor supported by any evidence. As previously shown in this brief the answer did not allege that Carroll acted from any personal animosity and outside the scope of his authority, but on the contrary, it alleged facts from which the jury could have inferred that at the time and place in question, Carroll was protecting the peace and quiet of Novick's Bar, such bar being at the time solely in Carroll's charge, and that he was protecting Novick's property (Answer Par. IV, V, VII, X, Tr. pp. 10-13). No evidence was introduced to show that Carroll was acting in any manner except in performing his duties for appellants. In any event the matter contained in appellants' requested instruction number 1 which was before the Court was given in substance in instructions numbered 5-C and 6.

Appellants' requested instruction number II was not justified either by the pleadings or the evidence and if given would have instructed the jury on issues not before the Court.

That portion of the matter covered in appellants' requested instruction number II which was properly before the Court was given in substance in instructions 5-C and 6.

Appellants' requested instruction number III was not justified by the evidence of the case and the matter contained in such requested instruction was fully covered by instructions 5-C and 6 as given.

The matter contained in appellants' requested instruction number IV was given in substance in the Court's instruction 7.

Appellants' requested instruction number V is substantially the same as appellants' requested instructions I, II, and III, and appellee's comments as to appellants' such requested instructions are equally applicable to requested instruction number V.

Dated, Anchorage, Alaska,
December 10, 1948.

Respectfully submitted,
EDWARD V. DAVIS,
WILLIAM W. RENFREW,
DAVIS & RENFREW,
Attorneys for Appellee.

United States
Circuit Court of Appeals

For the Ninth Circuit.

see vol. 2520

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL,
DANIEL RODRIGUES FERREIRA, YUTAKA GO-
HARA, CORNEL IHA, MASASHI KAGEYAMA, TORO-
ICHI KANDA, FRANK GONSALVES PERREIRA,
NOBORU TAKEUCHI, FRED TANIGUCHI and GEN-
KICHI WADA,

Appellants,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth
Judicial Circuit of the Territory of Hawaii and WALTER
D. ACKERMAN, JR., as Attorney General of the Terri-
tory of Hawaii,

Appellees.

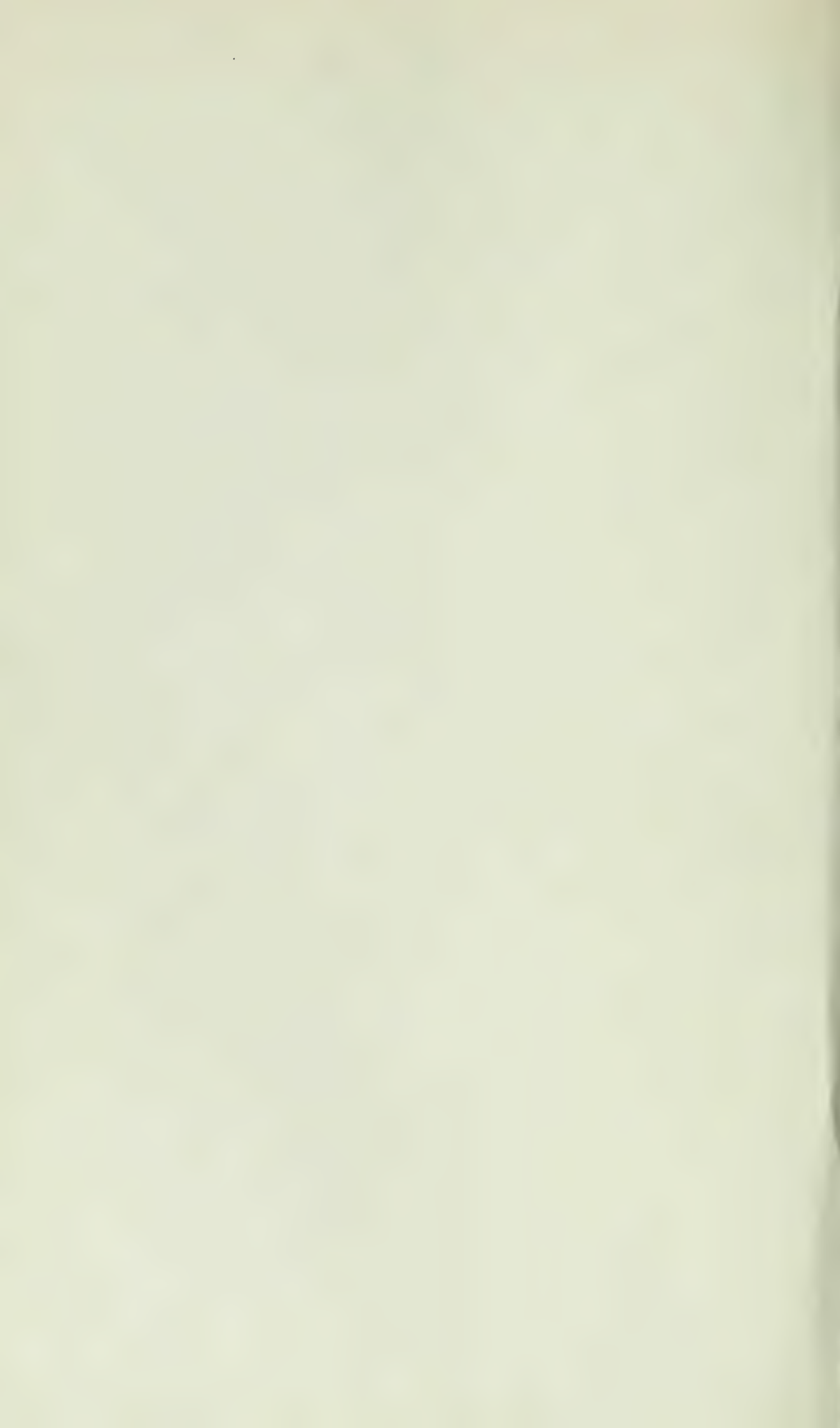
Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Hawaii

FILED

APR 24 1948

PAUL P. O'BRIEN



No. 11872

United States
Circuit Court of Appeals
For the Ninth Circuit.

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL,
DANIEL RODRIGUES FERREIRA, YUTAKA GO-
HARA, CORNEL IHA, MASASHI KAGEYAMA, TORO-
ICHI KANDA, FRANK GONSALVES PERREIRA,
NOBORU TAKEUCHI, FRED TANIGUCHI and GEN-
KICHI WADA,

Appellants,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth
Judicial Circuit of the Territory of Hawaii and WALTER
D. ACKERMAN, JR., as Attorney General of the Terri-
tory of Hawaii,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Hawaii

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint.....	69
Exhibits:	
A—Certificate of Deputy Clerk of Court	81
Petition for Injunction, Order to	
Show Cause.....	86
Petitioner's Exhibits:	
No. 1—Affidavit of Ronald G.	
Watt	96
2—Affidavit of Keith B.	
Tester	99
3—Affidavit of Antone Ca-	
mara	104
4—Affidavit of Hale C.	
Cheatham	107
5—Affidavit of Wm. A. H.	
Buddingh	111
6—Affidavit of Norbert Penna	114
7—Affidavit of Courtland E.	
Ashton	117
8—Affidavit of Leonard T.	
Cannon	119
9—Affidavit of Alexander G.	
Hutton	122

	INDEX	PAGE
Exhibit A—(Continued):		
10—Affidavit of Harry Nogami		124
11—Affidavit of Courtland E. Ashton		126
12—Affidavit of William A. H. Buddingh		127
13—Affidavit of Ronald G. Watt		129
14—Affidavit of John S. Car- valho		131
15—Affidavit of Mary Soares..		134
16—Affidavit of Georgina Rosa		136
17—Affidavit of Mr. and Mrs. Antone Camara		138
18—Affidavit of Charles J. Fern		140
19—Affidavit of C. E. S. Burns		142
20—Affidavit of John Travasso		147
21—Affidavit of Frank Bar- retto		149
22—Affidavit of Ira W. Newton		151
23—Affidavit of James P. Langley		152
24—Letter from Y. Morimoto, Business Agent, ILWU, Local 149, to Lihue Plan- tation Company, Ltd.....		159
Amended Temporary Restraining Order		198

INDEX

PAGE

Exhibit A—(Continued) :

Amended Temporary Restraining Order—Officer's Return	239, 240, 241, 242
Chamber Summons.....	185
Chambers Summons Petition for Injunction, Order to Show Cause, Temporary Restraining Order— Officer's Return	206, 207, 208, 210, 211, 212
Clerk's Minutes — September 17, 1946	160
Clerk's Minutes — September 20, 1946	189
Clerk's Minutes — September 23, 1946	195
Clerk's Minutes — September 27, 1946	228
Clerk's Minutes — November 18, 1946	243
Court's Exhibit No. 1—Radiogram Jack Hall.....	194
Motion for Temporary Restraining Order	175
Order for Service of Copies of Amended Temporary Restraining Order	204
Order for Service of Copies of Amended Temporary Restraining Order, Amended Temporary Re- straining Order — Officer's Re- turn	214, 215, 216, 217, 219

INDEX	PAGE
Exhibit A—(Continued) :	
Order to Show Cause.....	179
Stipulation and Order Extending Time on Order to Show Cause....	223
Stipulation and Order Extending Time on Order to Show Cause...	232
Stipulation Extending Time....	226, 230
Telegram from C. Nils Tavares to Judge P. L. Rice.....	188
Temporary Restraining Order.....	181
Transcript of Oral Motion on Behalf of Respondents to Dissolve and Vacate the Temporary Restraining Order, and Oral Decision and Ruling of the Court on Said Mo- tion	235
B—Transcript of Evidence.....	246
Testimony of Caleb E. S. Burns....	251
Testimony of Charles James Fern..	294
Testimony of Courtland E. Ashton..	263
Testimony of Georgina Rosa.....	270
Testimony of James P. Langley....	279
Testimony of Keith B. Tester.....	289
Testimony of Leonard T. Cannon...	285
Testimony of Mary Soares.....	266
Testimony of William A. H. Bud- dingh	274

INDEX

PAGE

Answer to Complaint of C. Nils Tavares, Defendant	305
Appeal:	
Notice of.....	344
Petition for Restoration of Injunction Pending	345
Order Restoring Injunction Pending.....	351
Designation of Record on.....	370
Bond on.....	373
Certificate of Clerk to Transcript of Record on.....	376
Statement of Points on.....	378
Bond on Appeal.....	373
Certificate of Clerk to Transcript of Record on Appeal	376
Clerk's Statement.....	2
Complaint for Injunction, Order to Show Cause, and Temporary Restraining Order...	5
Exhibits:	
A—Petition for Injunction.....	23
B—Amended Temporary Restraining Order	41
Decision Upon Motion for Determination of Defenses in Advance of Trial—F.R.C.F. 12(d) .	314
Defendant's Objections to Allowance of Preliminary Injunction.....	52
Designation (DC) of Record on Appeal.....	370

INDEX	PAGE
Judgment and Decree Dismissing Action and Dissolving Preliminary Injunction.....	343
Motion for Hearing and Determination of De- fenses Before Trial.....	306
Notice of Motion.....	309
Motion that Court Consider Whole Record Made by Pleadings.....	312
Notice of Motion.....	313
Motion to Strike and Notice of Motion.....	309
Notice of Motion.....	310
Names and Addresses of Attorneys of Record..	1
Notice of Appeal.....	344
Order Extending Time to File and Docket Rec- ord with the United States Circuit Court of Appeals for the Ninth Circuit.....	373
Order Restoring Injunction Pending Appeal..	351
Order to Show Cause and Temporary Restrain- ing Order.....	49
United States Marshal's Return.....	51
Petition for Restoration of Injunction Pending Appeal	345
Preliminary Injunction.....	66
United States Marshal's Return.....	69
Ruling Upon Motion for a Preliminary Injunc- tion	54
Opinion	59

INDEX	PAGE
Statement Pursuant to Rule 19, Subdivision 6.	378
Stipulation and Order Approving Stipulation.	348
Stipulation and Order Approving Stipulation with Exhibit.....	355
Information and Exhibit A.....	357
Exhibit A—Amended Temporary Restraining Order.....	365
Stipulation and Order re Substituting Walter D. Ackerman for Rhoda V. Lewis as a De- fendant	340
Stipulation and Order re Substitution of De- fendant	311
Suggestion of Death of Plaintiff Joseph Mendes and Order of Abatement.....	342
Order of Abatement.....	342
Summons	47
Return on Service of Writ.....	48

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

For the Plaintiffs, Constancio R. Alesna, et al.:

HARRIET BOUSLOG, and
MYER C. SYMONDS,
206 Terminal Building,
Honolulu 10, Hawaii.

GLADSTEIN, ANDERSEN, RESNER &
SAWYER,
240 Montgomery Street,
San Francisco 4, California.

For the Defendants, Philip L. Rice, and C. Nils
Tavares:

RHODA V. LEWIS, and
MICHIO WATANABE,
Deputy Attorneys General,
Iolani Palace,
Honolulu, T. H.

Amicus Curiae, Hawaii Employers Council:

LIVINGSTON JENKS,
Bank of Hawaii Building,
Honolulu, T. H. [1*]

* Page numbering appearing at foot of page of original certified
Transcript of Record.

In the United States District Court for the
District of Hawaii

Civil No. 769

CONSTANCIO R. ALESNA, et al.,

Plaintiffs,

vs.

PHILIP L. RICE, as Judge of the Circuit Court
for the Fifth Judicial Circuit of the Territory
of Hawaii, et al.,

Defendants.

CLERK'S STATEMENT

Time of Commencing Suit: January 31, 1947—
Complaint for Injunction filed.

Names of Original Parties: Constancio R.
Alesna, et al., Plaintiffs; Philip L. Rice, and C. Nils
Tavares, Defendants.

Dates of Filing Pleadings

1947

Feb. 10—Defendants' Objections to Allowance of
Preliminary Injunction.

Feb. 25—Ruling Upon Motion for a Preliminary
Injunction.

July 21—Answer to Complaint of C. Nils Tavares,
Defendant.

July 21—Answer to Complaint.

July 22—Motion for Hearing and Determination of
Defenses Before Trial and Notice of
Motion.

1947

Aug. 11—Motion to Strike and Notice of Motion.

Aug. 20—Stipulation and Order.

Sept. 4—Motion (to consider whole record). [2]

Dec. 4—Decision Upon Motion for Determination
of Defenses in Advance of Trial F.R.C.P.
12 (d).

Dec. 20—Stipulation and Order.

Dec. 20—Suggestion of Death of Plaintiff Joseph
Mendes and Order of Abatement.

Dec. 22—Judgment and Decree Dismissing Action
and Dissolving Preliminary Injunction.

Dec. 24—Petition for Restoration of Injunction
Pending Appeal.

1948

Jan. 8—Stipulation and Order Approving Stipu-
lation.

Jan. 8—Order Restoring Injunction Pending Ap-
peal.

Jan. 20—Stipulation and Order Approving Stipula-
tion With Exhibit.

Dates of Issuance of Process

1947

Jan. 31—Order to Show Cause and Temporary Re-
straining Order.

Feb. 20—Preliminary Injunction.

Proceedings in the above-entitled matter were had
before the Honorable J. Frank McLaughlin, Judge,
United States District Court, District of Hawaii.

Dates of Filing Appeal Documents

1947

Dec. 24—Notice of Appeal.

1948

Jan. 22—Designation of Record on Appeal.

Jan. 27—Order Extending Time to File and Docket
Record With the United States Circuit
Court of Appeals for the Ninth Circuit.

Feb. 10—Bond on Appeal.

Certificate of Clerk to the Above Statement
United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States [3] Court for the District of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause, the names of the original parties, the dates when the respective pleadings were filed, the name of the judge presiding, and the dates when appeal pleadings were filed and issued in the above-entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 18th day of February, 1948.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of
Hawaii. [4]

In the United States District Court for the
District of Hawaii

Civil No. 769

CONSTANCIO R. ALESNA, et al.,

Plaintiffs,

vs.

PHILIP L. RICE, as Judge of the Circuit Court
for the Fifth Judicial Circuit of the Terri-
tory of Hawaii, et al.,

Defendants.

COMPLAINT FOR INJUNCTION, ORDER TO
SHOW CAUSE, AND TEMPORARY RE-
STRAINING ORDER

Now come plaintiffs above named and for a first
cause of action allege:

I.

The plaintiffs bring and maintain this suit to
redress the deprivation, under color of territorial
law, of rights secured by laws of the United States
providing for equal rights of citizens of the United
States and of persons within the jurisdiction of the
United States, pursuant to Section 41, subdivision
(14) of Title 28 of the United States Code
Annotated.

II.

That the plaintiffs are citizens of the United
States [6] or persons within the jurisdiction of the
United States entitled to the protection of its laws;
that plaintiffs are residents of the Territory of

Hawaii and within the jurisdiction of this Court; that plaintiffs are residents of the County of Kauai in said Territory, which county is in the jurisdiction of the fifth judicial circuit of said Territory; that plaintiffs are members of the International Longshoremen's and Warehousemen's Union, C.I.O., and of Local 149 of said International Longshoremen's and Warehousemen's Union; that said unions are trade unions engaged as such in the Territory of Hawaii, maintaining offices in Honolulu and on the Island of Kauai.

III.

That the defendant, Philip L. Rice, is the regularly appointed and acting judge of the circuit court of the fifth judicial circuit of the Territory of Hawaii.

IV.

That the defendant, C. Nils Tavares, is the regularly appointed and acting Attorney General of the Territory of Hawaii.

V.

That the defendants herein have engaged in a course of conduct, hereinafter fully described, in violation of plaintiff's rights under the Clayton Act (29 U.S.C.A., Sections 52, 53), and the Norris-La Guardia Act (29 U.S.C.A., Sections 101-115); and defendants acting in contravention of these laws of the United States have injured, oppressed and intimidated citizens of the United States, including the individual [7] plaintiffs herein in the free

exercise and enjoyment of the rights and privileges secured to them by these laws of the United States; and that unless restrained defendants will continue in their unlawful conduct.

VI.

That on the 17th day of September, 1946, the Lihue Plantation Company, Limited, filed a Petition for Injunction and Order to Show Cause in said circuit court of the fifth judicial circuit, requesting the defendant Philip L. Rice to issue without hearing, a restraining order in a labor dispute; that the said petition is entitled "The Lihue Plantation Company, Limited, Petitioner, v. International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Roe, et al., respondents, being Equity No. 120 among the records of said court; that a copy thereof is attached hereto and marked Exhibit "A" and made a part hereof as though fully set forth herein.

VII.

That on the 17th day of September, 1946, the defendant, Philip L. Rice issued a temporary re-

straining order ex parte at the request of said Lihue Plantation Company, Limited, in contravention of said Clayton and Norris-LaGuardia Acts; that respondents named in said Lihue Plantation Company Petition thereafter entered an appearance and presented an oral motion [8] to dissolve said Temporary Restraining Order on the ground it was issued without authority of law and in violation of the Norris-LaGuardia Act; that the defendant Philip L. Rice refused to dissolve said Temporary Restraining Order and held that the Norris-LaGuardia Act did not apply to the Territory and to circuit courts of the Territory; that thereafter on the 23rd day of September, 1946, the said defendant Philip L. Rice, acting upon his own initiative, modified the aforesaid temporary restraining order and issued an amended temporary restraining order; that a copy thereof is attached hereto and marked Exhibit "B" and made a part hereof as though fully set forth herein.

VIII.

That on the 29th day of October, 1946, the Grand Jury of the fifth Circuit court of the Territory of Hawaii returned an indictment against plaintiffs wherein it is alleged that plaintiffs unlawfully, feloniously and wilfully disobeyed said amended temporary restraining order; that a copy of said indictment is attached hereto and marked Exhibit "C" and made a part hereof as though fully set forth herein.

IX.

That during all times herein mentioned, a labor dispute existed between the respondents against whom said amended temporary restraining order was issued by the defendant Philip L. Rice and the petitioner therein, The Lihue Plantation Company, Limited; that said labor dispute related to the demands of said respondents for wages and general conditions of employment on behalf of the members of said respondent labor unions, including the plaintiffs herein, some of whom are employed by The Lihue Plantation Company, Limited, and [9] others of whom are employed by other plantation companies on the Island of Kauai.

X.

That the said circuit court of the fifth judicial circuit of the Territory of Hawaii is a court of the United States as defined in the said Norris-LaGuardia Act; that under the terms of that Act no court of the United States has jurisdiction to issue a restraining order or temporary or permanent injunction in a labor dispute without strictly complying with the terms and conditions of the Act; that no such court may under that Act restrain activities made lawful by the Act.

XI.

That the defendant Philip L. Rice, in issuing the temporary restraining order and the amended temporary restraining order, failed to comply with any

of the provisions of said Act required to be complied with before a court of the United States has jurisdiction to issue a restraining order; that the defendant Philip L. Rice in said injunction proceedings by said amended restraining order restrained the respondent labor organizations of which plaintiffs are members from engaging in activity specifically made lawful by said Clayton and Norris-LaGuardia Acts.

XII.

That by virtue of the terms and provisions of said Clayton and Norris-LaGuardia Acts, the defendant Philip L. Rice was at all times herein mentioned without lawful authority or jurisdiction to issue said temporary restraining order or amended restraining order; that plaintiffs by virtue of said [10] Acts had a right to engage in activity unlawfully restrained by said defendant; that by virtue of the terms and provisions of said laws of the United States the amended temporary restraining order is null and void and no contempt proceedings can be predicated upon alleged violation of an unlawful order without depriving the plaintiffs herein of rights secured by said laws of the United States.

XIII.

That the said indictment charging defendants with criminal contempt is wholly predicated upon violation of the void amended restraining order issued by the defendant Philip L. Rice; that the said indictment charges plaintiffs with a crime for

engaging in concert with others in activity specifically made lawful by said Clayton and Norris-LaGuardia Acts.

XIV.

That the defendant Philip L. Rice has set said criminal contempt proceedings on his Calendar for plea on February 4, 1947, and has informed counsel for plaintiffs herein that he intends to proceed forthwith with the trial of plaintiffs herein for contempt of said void amended restraining order issued by him; that the defendant Philip L. Rice has already deprived the plaintiffs herein of rights guaranteed by said laws of the United States; that he has already refused to comply with the provisions of said laws and has restrained activity made lawful therein; that if said defendant is not restrained he will proceed to try plaintiffs for criminal contempt of said circuit court of the fifth judicial circuit for alleged violations of said void Amended Temporary Restraining Order and for engaging in activity specifically made lawful [11] by said laws of the United States.

XV.

That the said defendant C. Nils Tavares as Attorney General will, unless restrained by this court, conduct the prosecution of plaintiffs on the 4th day of February, as aforesaid.

XVI.

That the said defendants by their actions and threats as aforesaid will, unless restrained by this

court, and in utter and complete disregard of the provisions of the Clayton and Norris-LaGuardia Acts deprive plaintiffs of their rights secured by these laws of the United States to be free from any legal restraints or prosecution by a court of the United States for having engaged in concert with others in peaceful picketing during the course of a labor dispute.

XVII.

That plaintiffs have no plain, adequate and speedy remedy at law.

As and for a second separate and distinct cause of action, plaintiffs allege as follows, to wit:

I.

Plaintiffs reiterate and incorporate, as though fully set forth herein, all the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, XII, XIII, XIV, XV, XVI, and XVII of the first cause of action. [12]

II.

That by the Clayton and Norris-LaGuardia Acts Congress conferred exclusive jurisdiction on the United States District Court for the Territory of Hawaii to issue, after compliance with the provisions of said Act, injunctions in any controversy involving a labor dispute; that it appears in the Petition for Injunction filed with said circuit court for the fifth judicial circuit by The Lihue Plantation Company, Limited, that the restraining order

requested was to restrain trade unions and officers and members of trade unions involved in a labor dispute with said petitioner therein; that the defendant Philip L. Rice was wholly without jurisdiction to proceed and was required by said Acts to dismiss the petition and proceed no further therein; that the said defendant Philip L. Rice being wholly without jurisdiction to issue the temporary restraining order or amended restraining order, the amended restraining order is a nullity and the said defendant is wholly without jurisdiction to try the plaintiffs herein for alleged contempt thereof.

As and for a third separate and distinct cause of action, plaintiffs allege as follows, to wit:

I.

Plaintiffs reiterate and incorporate, as though fully set forth herein, all the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, XII, XIII, XIV, XV, XVI, and XVII of the first cause of action.

II.

That the Clayton and Norris-LaGuardia Acts specifically [13] secured and guaranteed to all persons and associations within the territory the right to engage in clearly defined types of trade union activity without previous restraint by injunction or fear of subsequent punishment; that among these substantive rights which cannot be restrained and cannot be held or considered to be violations of any law of the United States is the right to engage in concert with others in picketing so long as said pick-

eting is not accompanied by fraud or violence; that the amended temporary restraining order issued by the defendant Philip L. Rice enjoined respondents in said injunction proceedings from engaging in concert in mass picketing; that the violation of said void amended temporary restraining order, charged in the said indictment against plaintiffs, is the alleged engaging in mass picketing; that no acts of fraud or violence are alleged in said indictment to have been committed by plaintiffs; that the defendants unless restrained will force the plaintiffs to stand trial for acts made lawful by the Clayton and Norris-LaGuardia Acts, thus depriving plaintiffs of rights specifically guaranteed to them and made lawful by said laws of the United States.

As and for a fourth separate and distinct cause of action, plaintiffs, Daniel Rodriguez Ferreira, Yutaka Gohara, Cornel Iha, Masashi Kageyama, Torochi Kanda, Ralph Joseph Mendes, Frank Gonsalves Perreira, Noboru Takeuchi, Fred Taniguchi, and Genkichi Wada, allege as follows:

I.

The plaintiffs bring and maintain this count to redress the deprivation, under color of territorial law of rights, privileges and immunities secured by the Constitution of the [14] United States and of rights secured by laws of the United States providing for equal rights of citizens of the United States and of persons within the jurisdiction of the United States, pursuant to Section 41, subdivision (14) of Title 28 of the United States Code Annotated.

II.

That the plaintiffs are citizens of the United States entitled to the protection of rights guaranteed by the Constitution and the laws of the United States; that plaintiffs are residents of the Territory of Hawaii and within the jurisdiction of this Court; that plaintiffs are residents of the County of Kauai in said Territory, which county is in the jurisdiction of the fifth judicial circuit of said Territory; that plaintiffs are members of the International Longshoremen's and Warehousemen's Union (CIO) and of Local 149 of said International Longshoremen's and Warehousemen's Union; that said unions are trade unions engaged as such in the Territory of Hawaii, maintaining offices in Honolulu and on the Island of Kauai.

III.

That the defendant, Philip L. Rice, is the regularly appointed and acting judge of the circuit court of the fifth judicial circuit of the Territory of Hawaii.

IV.

That the defendant, C. Nils Tavares, if the regularly appointed and acting Attorney General of the Territory of Hawaii. [15]

V.

That the defendants herein have engaged in a course of conduct, hereinafter fully described, in violation of plaintiffs' right to engage in peaceful picketing, guaranteed by the right of free speech

and of the press and of peaceable assembly under the First Amendment of the Constitution and by the privileges and immunities and due process clauses of the Fourteenth Amendment and further protected under the Clayton Act and the Norris-LaGuardia Act; and defendants acting in contravention of these constitutional rights of plaintiffs and rights given by said laws of the United States have injured, oppressed and intimidated citizens of the United States, including the individual plaintiffs herein in the free exercise and enjoyment of the rights and privileges secured to them by the Constitution and laws of the United States; and that unless restrained defendants will continue in their unlawful conduct.

VI.

That on the 17th day of September, 1946, the Lihue Plantation Company, Limited, filed a Petition for Injunction and Order to Show Cause in said circuit court of the fifth judicial circuit, requesting the defendant to issue without hearing, a restraining order in a labor dispute; that the said petition is entitled "The Lihue Plantation Company, Limited, Petitioner v. International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, Sunao Iwamoto, William Paia, Yoshikazu [16] Morimoto, Benjamin Iida, George Masaki, Charles

Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Roe, et al., respondents, being Equity No. 120 among the records of said court; that a copy thereof is attached hereto and marked Exhibit "A" and made a part hereof as though fully set forth herein.

VII.

That on the 17th day of September, 1946, the defendant Philip L. Rice issued a temporary restraining order ex parte at the request of said Lihue Plantation Company, Limited, in violation of plaintiffs' rights guaranteed by the Constitution and in contravention of said Clayton and Norris-LaGuardia Acts; that respondents named in said Lihue Pantation Company Petition thereafter entered an appearance and presented an oral motion to dissolve said Temporary Restraining Order on the ground it was issued without authority of law and in violation of constitutional rights and the Norris-LaGuardia Act; that the defendant Philip L. Rice refused to dissolve said Temporary Restraining Order, ignoring plaintiffs' constitutional rights and holding that the Norris-LaGuardia Act did not apply to the Territory and to circuit courts of the Territory; that thereafter on the 23rd day of September, 1946, the said defendant Philip L. Rice acting upon his own initiative modified the aforesaid temporary restraining order and issued an amended temporary restraining order; that a copy thereof is attached hereto and marked Exhibit "B" and made a part hereof as though fully set forth herein.

VIII.

That on the 29th day of October, 1946, the Grand Jury [17] of the fifth circuit court of the Territory of Hawaii returned an indictment against plaintiffs wherein it is alleged that plaintiffs unlawfully, feloniously and wilfully disobeyed said amended temporary restraining order; that a copy of said indictment is attached hereto and marked Exhibit "C" and made a part hereof as though fully set forth herein.

IX.

That during all times herein mentioned, a labor dispute existed between the respondents against whom said amended temporary restraining order was issued by the defendant Philip L. Rice and the petitioner therein, The Lihue Plantation Company, Limited; that said labor dispute related to the demands of said respondents for wages and general conditions of employment on behalf of the members of said respondent labor unions, including the plaintiffs herein, some of whom are employed by The Lihue Plantation Company, Limited, and others of whom are employed by other plantation companies on the Island of Kauai.

X.

That by virtue of rights guaranteed as aforesaid by the Constitution of the United States and by said laws of the United States the defendant Philip L. Rice was at all times herein mentioned without lawful authority or jurisdiction to issue said temporary restraining order or amended restraining order

denying plaintiffs the free exercise of their right to peacefully and in concert with others picket the premises of The Lihue Plantation Company, Limited, and of the homes of employees; that the amended temporary restraining order being wholly void, contempt proceedings cannot be predicated upon alleged violation of an unlawful order or upon the exercise of the right to picket in concert with others guaranteed by the constitution and laws of the United States.

XI.

That the defendant Philip L. Rice has set said criminal contempt proceedings on his calendar for plea on February 4, 1947, and has informed counsel for plaintiffs herein that he intends to proceed forthwith with the trial of plaintiffs herein for contempt of said void amended restraining order issued by him; that the defendant Philip L. Rice has already deprived the plaintiffs herein of rights guaranteed by the Constitution and said laws of the United States; that he has already violated said constitutional rights of plaintiffs and refused to comply with the provisions of said laws and has restrained lawful activity; that if the defendant Philip L. Rice is not restrained he will proceed to try plaintiffs for criminal contempt of said circuit court of the fifth judicial circuit for alleged violations of said void amended temporary restraining order and for engaging in peaceful picketing, a right guaranteed plaintiffs by the Constitution and specifically made lawful and not subject to criminal prosecutions by said laws of the United States.

XII.

That the said indictment charging defendants with criminal contempt is wholly predicated upon violation of the void amended restraining order issued by the defendant Philip L. Rice; that the said indictment charges plaintiffs with a crime for engaging in concert with others in peaceful picketing, a right guaranteed by the Constitution and specifically [19] made lawful by said laws of the United States.

XIII.

That the said defendant C. Nils Tavares as Attorney General will, unless restrained by this court, conduct the prosecution of plaintiffs on the 4th day of February, as aforesaid.

XIV.

That the said defendants by their actions and threats as aforesaid will, unless restrained by this court, and in utter and complete disregard of rights guaranteed by the Constitution and of provisions of the Clayton and Norris-LaGuardia Acts deprive plaintiffs of their rights secured by the Constiution and laws of the United States to be free from any legal restraints or prosecution for having engaged in concert with others in peaceful picketing during the course of a labor dispute.

XV.

That plaintiffs have no plain, adequate and speedy remedy at law.

Wherefore plaintiffs pray that the above entitled court make and enter the following orders, to wit:

1. Directing defendants to show cause on a day certain, why a preliminary injunction should not be granted restraining all further proceedings in that certain criminal indictment entitled "Territory of Hawaii v. Constancio R. Alesna, et al.," Criminal No. 896, pending in the circuit court of the fifth circuit, Territory of Hawaii, pending trial on the merits or from proceeding with any contempt proceedings in connection [20] with any alleged violation of the amended temporary restraining order issued in that certain action entitled "The Lihue Plantation Company, Limited v. International Longshoremen's and Warehousemen's Union (IO) et al., Equity No. 120, pending in said court, pending trial on the merits herein.

2. That pending the hearing on the order to show cause a temporary restraining order issue against defendants.

3. That upon the trial on the merits a permanent injunction be granted against defendants.

4. For such other and further relief as the court deems proper in the premises.

/s/ HARRIET BOUSLOG,

/s/ MYER C. SYMONDS,

Attorneys for Plaintiffs. [21]

Territory of Hawaii,

City and County of Honolulu—ss.

Harriet Bouslog, being first duly sworn, on oath, deposes and says: that she is one of the attorneys for the plaintiffs in the foregoing complaint; that affiant makes this verification for and on behalf of said plaintiffs as none of said plaintiffs resides or is located in the City and County of Honolulu, where affiant maintains her office; that she has read said complaint, knows the contents thereof and that the statements therein contained are true of her own knowledge except as to matters therein stated upon information or belief, and as to those matters she believes it to be true.

/s/ HARRIET BOUSLOG.

Subscribed and sworn to before me this 31st day of January, 1947.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of
Hawaii. [22]

EXHIBIT A

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

Eq. No.

At Chambers—In Equity

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO),
LOCAL 149 OF THE INTERNATIONAL
LONGSHOREMEN'S AND WAREHOUSE-
MEN'S UNION (CIO), UNIT 1, LOCAL 149
OF THE INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S UNION
(CIO), JOSEPH NUNES, DANIEL
RAPOZO, FERNANDO FONTANILLAS,
THOMAS TAKEMOTO, SUNAO IWA-
MOTO, WILLIAM PAIA, YOSHIKAZU
MORIMOTO, BENJAMIN IIDA, GEORGE
MASAKI, CHARLES MORITA, RONALD
TOYOFUKU, TAKU AKAMA, JOHN DOE,
MARY DOE, RICHARD DOE, et al.,

Respondents.

PETITION FOR INJUNCTION AND ORDER
TO SHOW CAUSE

To the Honorable Philip Rice, Judge of the Above
Entitled Court, Presiding at Chambers in
Equity:

Comes now, The Lihue Plantation Company, Limited, Petitioner herein, and respectfully alleges and shows as follows:

I.

That the Petitioner, The Lihue Plantation Company, Limited, is a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii with its main offices located in Honolulu, City and County of Honolulu, Territory of Hawaii;

II.

That the Respondent, International Longshoremen's and Warehousemen's Union (CIO), is an unincorporated labor union association, whose regional offices in the Territory of Hawaii are located at Pier 11, Queen Street, City and County of Honolulu, Territory, and whose main offices are located in San Francisco, California;

III.

That the Respondent Local 149 of the International Longshoremen's and Warehousemen's Union, is a local union of the above named Respondent International Longshoremen's and Warehousemen's Union, and is composed of units for each of the sugar plantations located in the Territory of Hawaii; that so far as the Petitioner has been able to ascertain, the offices of said Local 149 are located at Pier 11, South Queen Street, City and County of Honolulu, Territory of Hawaii;

IV.

That the Respondent Unit 1, Local 149, International Longshoremen's and Warehousemen's Union,

is an unincorporated association, and a unit of the Respondent Local 149 referred to in Paragraph III herein above; that said Unit is composed of certain employee members from among the employees of the Petitioner; and that the offices of said Unit are located at Kapaia, County of Kauai, Territory of Hawaii; [24]

V.

That upon information and belief of the Petitioner, the individuals named Respondents, Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, and Sunao Iwamoto are President, First Vice-President, Second Vice-President, Recording Secretary, and Financial Secretary, respectively, of the Respondent Union Local 149, Unit 1; that Respondent William Paia is the Island President of said Respondent Union Local 149; that Yoshikazu Morimoto is Business Agent of said Respondent Union Local 149 for the Island of Kauai; that the individual named Respondents Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama are each members of the above Respondent Unit 1, Local 149; that each of the above-named individual Respondents are residents of the Island of Kauai, Territory of Hawaii; that the individual unnamed Respondents are unknown and for that reason certain fictitious names are used; that said individual unnamed Respondents include members of the above-named Respondent Unit 1, Local 149, Respondent Local 149, and Respondent International Longshoremen's and Warehousemen's Union, their officers, agents and servants, and others acting in concert and participation with the Respondents;

VI.

That the Respondent International Longshoremen's and Warehousemen's Union, Local 149, did, on the first day of September, 1946, call out on strike the Petitioner's employees at the Petitioner's plantation located in the County of Kauai, Territory of Hawaii; that the Respondents, their agents, servants and employees, and others in active [25] concert and participation with them have congregated and still continue to congregate in mobs and as picketers at times in excess of two hundred (200) persons, near or upon plantation property in the immediate vicinity of the entrances to the mill, store, and other premises of the Petitioner in a disorderly and unlawful manner, and have wilfully and maliciously blocked and continue to block the entrance to the Petitioner's premises; that said Respondents, their agents, servants and employees and others in active concert and participation with them continue to congregate at all hours of the day and especially when Petitioner's supervisory personnel and other employees seek to enter upon the mill premises; that said Respondents, their agents, servants and employees and others in active concert and participation with them have indicated by their actions and otherwise their firm intention to deny and have denied to the Petitioner lawful entry upon its premises, and to deny entry to any other persons lawfully seeking to enter upon said premises, whether for the purposes of general maintenance and repair, proper protection and operation of utility equipment serving the community, preservation

of foodstuffs, or operations directed to the care of growing crops and the undertaking of customary operations in connection therewith; that said mobs and picketers are at times boisterous, and use offensive, disorderly, abusive and insulting language, directing it at the employees of the Petitioner; that the Respondents, their agents, servants and employees, and others in active concert and participation with them, have threatened and still continue to threaten Petitioner's employees with serious injury to their persons if they do not accede to Respondent's demands or if they attempt to proceed to work and to perform work; that said picketers and their activities as specified, have threatened to cause and have in fact caused numerous breaches of the peace; that the Respondents, their agents, servants and employees, and those in active concert and participation with them, unlawfully have picketed in numbers at times in excess of one hundred and fifty (150) persons, and are continuing to picket many of the homes of the Petitioner's employees; that the said Respondents, their agents, servants, and employees and those in active concert and participation with them have congregated in front and around of the said homes and have used offensive, abusive, disorderly and insulting language and have caused disturbances by undue noise and unseemly acts so as to annoy, disturb, and be offensive to others; that said Respondents, their agents, servants, and employees and those others in active concert and participation with them have used threatening and intimidating language towards the petitioner's

employees concerning the safety of their families, and by their congregating have frightened and intimidated the members of the families of the Petitioner's employees; that the Respondents, their agents, servants and employees and those in active concert and participation with them unlawfully have picketed many roads and streets throughout plantation property, stopping and intimidating any and all persons seeking ingress on such roads and streets; [27]

VII.

That by reason of the conduct of the Respondents set forth in Paragraph VI, said Respondents have obstructed the means of ingress and egress used by Petitioner's employees to and from said mill, store and other plantation premises and have intimidated Petitioner's employees desiring to enter or proceed in and from said premises;

VIII.

That by reason of the conduct of the Respondents set forth in Paragraph VI above, and by false and misleading statements to the employees of Petitioner, the Respondents have wilfully, unlawfully and maliciously prevented a number of persons from continuing in the active employ of Petitioner and from entering said plant to work or to seek employment with the Petitioner;

IX.

That by reason of the conduct of the Respondents and their agents, servants and employees and others in concert and participation with them, as set forth

in Paragraphs VI, VII, and VIII, Petitioner has been unable to repair or operate its mill, to irrigate its fields, properly maintain its utilities, protect its foodstuffs, or otherwise to perform even essential maintenance of equipment; that the unlawful acts set forth in this petition have been committed and that such acts will be continued, unless restrained; and that substantial and irreparable injury to the Petitioner's property will follow unless the requested relief is granted; [28]

X.

That, upon information and belief, the conduct of the Respondents, set forth in Paragraphs VI, VII, and VIII, above, will continue unless restrained;

XI.

That the Petitioner has no adequate remedy at law; Wherefore, Petitioner prays:

(1) That an order issue out of and under the seal of this Honorable Court as provided by law directed to the Respondents herein ordering them to appear ten days from the date of the filing of this petition and at a place to be designated by the Court and then and there to show cause, if any they have, why the injunction herein petitioned for should not be entered and issue; and

(2) That after a hearing hereon an order be entered herein restraining and enjoining the Respondents and each of them from in any way

(a) Interfering with the ingress and egress from the Petitioner's mill, store or other plantation buildings and premises located in the

County of Kauai, Territory of Hawaii, by the Petitioner, its employees, or any others who may enter said premises for the purpose of performing work or for other lawful occasion;

(b) Threatening violence or using coercion or intimidation by force of numbers or otherwise, or other unlawful means upon the employees of the Petitioner or those seeking employment with the Petitioner, or others lawfully entering upon the Petitioner's premises or proceeding to or from said premises; [29]

(c) Coercing or intimidating employees of the Petitioner or those seeking employment with the Petitioner, by means of threats concerning the safety and welfare of any of the Petitioner's employees families or those seeking employment with the Petitioner; or coercing or intimidating the families of the Petitioner's employees;

(d) Visiting the homes of the Petitioner's employees or persons seeking employment with the Petitioner or approaching, following or trailing any of said persons at any place whatsoever in an offensive, disorderly, threatening or intimidating manner, or in such a manner as to provide a breach of the peace;

(e) Picketing the homes of the Petitioner's employees or persons seeking employment with the Petitioner;

(f) Making, uttering or circulating any false, deceitful or untrue statements with reference to the Petitioner, its employment practices, and its employees working therein, or others seeking to work therein;

(g) Mass picketing or other congregating in crowds on or near the premises of the Petitioner;

(3) That the Court fix the proper number of pickets and restrain the Respondents from picketing the Petitioner's mill, offices, stores or other buildings or premises with more than the number so fixed by the Court, such pickets to wear badges reading "Authorized Picket"; [30]

(4) That the Court grant such other and further relief as the Petitioner may be entitled to in equity.

Dated: Lihue, Kauai, T. H. September 1946.

Territory of Hawaii,
County of Kauai—ss.

....., being first duly sworn, on oath deposes and says, That he is Manager of The Lihue Plantation Company, Limited, the Petitioner named herein; that he has read the foregoing petition, knows the contents thereof and that the allegations contained herein are true and correct, except the allegations made on information and belief and as to those he believes them to be true.

Subscribed and sworn to before me this day of, 1946. [31]

EXHIBIT C

In the Circuit Court of the Fifth Circuit,
Territory of Hawaii

January Term 1946

TERRITORY OF HAWAII

vs.

CONSTANCIO R. ALESNA, JOSE BAGOGO
BERNAL, DANIEL RODRIGUEZ FER-
REIRA, YUTAKA GOHARA, CORNEL
IHA, MASASHI KAGEYAMA, TOROICHI
KANDA, RALPH JOSEPH MENDES,
FRANK GONSALVES PERREIRA, NO-
BORU TAKEUCHI, FRED TANIGUCHI,
AND GENKICHI WADA,

Defendants.

CONTEMPT

(Violation of Sec. 11140, R.L.H. 1945.)

INDICTMENT

First Count:

The Grand Jury of the Fifth Circuit of the
Territory of Hawaii do present:

That at Lihue, County of Kauai, Territory of
Hawaii, and within the jurisdiction of this Honor-
able Court, on the 23rd day of September, 1946, a
certain lawful order, called an "Amended Tempo-
rary Restraining Order," was duly and lawfully
made, entered and issued by and in the name of the
Honorable Philip L. Rice, Circuit Judge, Fifth Cir-

cuit, Territory of Hawaii, in a cause entitled “Equity No. 120, In the Circuit Court of the Fifth Circuit, Territory of Hawaii, At Chambers, In Equity, The Lihue Plantation Company, Limited, Petitioner, vs. International Longshoremen’s [32] and Warehousemen’s Union (CIO), Local 149 of the International Longshoremen’s and Warehousemen’s Union (CIO), Unit 1, Local 149, of the International Longshoremen’s and Warehousemen’s Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, Sanao Iwamoto, William Paia, Yoshikaza Morimoto, Benjamin Iida, George Masaki, Charles Moritz, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Doe, et al., Respondents” (said parties being hereinafter referred to as petitioner and respondents, respectively), a true and correct copy of which lawful order is hereto attached, marked “Exhibit A,” and made a part hereof, which lawful order was directed, in the name of the Territory of Hawaii, to respondents and by which said lawful order respondents were restrained and enjoined from, among other things, in any way engaging in mass picketing by assembling in compact groups or congregating in crowds on or near real property of the petitioner, whether used for business or residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property by said petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property, and by which said

lawful order respondents were further ordered to limit the number of pickets used by respondents to not more than three (3) pickets in a group at any point and station when stationed at points of ingress to and egress from the petitioner's property, said lawful order providing that any pickets in excess of three (3) at any point and station should be in motion and, except [33] when passing each other, should maintain a distance of not less than ten (10) feet between each other and that such picketing as might be done by such pickets should not be violative of the foregoing restrictive provision relating to mass picketing, and by which lawful order all pickets were thereby enjoined from picketing other than in a peaceful and lawful manner and from obstructing the petitioner, its employees, or any other persons lawfully seeking to enter or leave the petitioner's premises and from otherwise committing the acts prohibited by the foregoing restrictive provision relating to mass picketing; that, pursuant to an order made and entered by said Court at Lihue aforesaid on said 23rd day of September, 1946, commanding the service of copies of said lawful order on each of said respondents, a certified copy of said lawful order was duly served on each of said respondents by handing and delivering to and leaving with each of them personally a certified copy thereof on said date in the Territory of Hawaii and within the jurisdiction of said Court.

That, notwithstanding said lawful order, Constancio R. Alesna, Jose Bagogo Bernal, Daniel Rodriguez Ferreira, Yutaka Gohara, Cornel Iha, Masashi Kageyama, Toroichi Kanda, Ralph Joseph Mendes, Frank Gonsalves Perreira, Noboru Takeuchi, Fred Taniguchi, and Genkichi Wada, and each of them, at Hanamaulu, in the County of Kauai, Territory of Hawaii, and within the jurisdiction of this Honorable [34] Court, on or about the 10th day of October, 1946, did unlawfully, feloniously and wilfully disobey said lawful order by then and there engaging in mass picketing with others, to the Grand Jurors unknown, by assembling with such others in compact groups and congregating in crowds on and near certain real property of the petitioner used for business purposes, to wit: the Hanamaulu Shop and the approaches thereto, to thereby prevent and attempt to prevent and physically obstruct and interfere with ingress to and egress from said real property by the petitioner, its employees, including Alfred G. Perreira, Eddie Medeiros, Manual Medeiros, William Farias, Manual Bugado and Ernest S. Carvalho III, and each of them, and other persons lawfully seeking to enter and leave said real property, the said Constancio R. Alesna, Jose Bagogo Bernal, Daniel Rodriguez Ferreira, Yutaka Gohara, Cornel Iha, Mahashi Kageyama, Totoichi Kanda, Ralph Joseph Mendes, Frank Gonsalves Perreira, Noboru Takeuchi, Fred Taniguchi, and Genkichi Wada, and each of them, then and there having notice and

knowledge of said lawful order and at all times herein mentioned being members of said International Longshoremen's and Warehousemen's Union (CIO) and Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), respondents hereinabove mentioned, and so in manner and form aforesaid, they, the said [35] Constancio R. Alesna, Jose Bagogo Bernal, Daniel Rodriguez Ferreira, Yutaka Gohara, Cornel Iha, Masashi Kageyama, Toroichi Kanda, Ralph Joseph Mendes, Frank Gonsalves Perreira, Noboru Takeuchi, Fred Taniguchi, and Genkichi Wada, and each of them, did unlawfully, feloniously and wilfully disobey said lawful order and were then and there and thereby in contempt of court, contrary to the form of the statute in such case made and provided.

Second Count:

And the Grand Jury of the Fifth Circuit of the Territory of Hawaii do further say and present in order to charge a further violation of the lawful order hereinafter mentioned and arising out of the transactions hereinabove set forth in the First Count of this indictment:

That at Lihue, County of Kauai, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the 23rd day of September, 1946, a certain lawful order, called an "Amended Temporary Restraining Order," was duly and lawfully made, entered and issued by and in the name of the Honorable Philip L. Rice, Circuit Judge, Fifth

Circuit, Territory of Hawaii, in a cause entitled "Equity No. 120, in the Circuit Court of the Fifth Circuit, Territory of Hawaii, At Chambers, In Equity, The Lihue Plantation Company, Limited, Petitioner, vs. International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149, of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel [36] Rapozo, Fernando Fontanilla, Thomas Takemoto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Doe, et al., Respondents" (said parties being hereinafter referred to as petitioner and respondents, respectively), a true and correct copy of which lawful order is hereto attached, marked "Exhibit A," and made a part hereof, which lawful order was directed, in the name of the Territory of Hawaii, to respondents and by which said lawful order respondents were restrained and enjoined from, among other things, in any way engaging in mass picketing by assembling in compact groups or congregating in crowds on or near real property of the petitioner, whether used for business or residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property by said petitioner, any of its employees, or any other persons lawfully seeking to enter or

leave any of said real property, and by which said lawful order respondents were further ordered to limit the number of pickets used by respondents to not more than three (3) pickets in a group at any point and station when stationed at points of ingress to and egress from the petitioner's property, said lawful order providing that any pickets in excess of three (3) at any point and station should be in motion and, except when passing each other, should maintain a distance of not less than ten (10) feet between each other and that such picketing as might be done by such pickets should not be violative of the foregoing restrictive provision relating to [37] mass picketing, and by which lawful order all pickets were thereby enjoined from picketing other than in a peaceful and lawful manner and from obstructing the petitioner, its employees, or any other persons lawfully seeking to enter or leave the petitioner's premises and from otherwise committing the acts prohibited by the foregoing restrictive provision relating to mass picketing; that, pursuant to an order made and entered by said Court at Lihue aforesaid on said 23rd day of September, 1946, commanding the service of copies of said lawful order on each of said respondents, a certified copy of said lawful order was duly served on each of said respondents by handing and delivering to and leaving with each of them personally a certified copy thereof on said date in the Territory of Hawaii and within the jurisdiction of said Court.

That, notwithstanding said lawful order, Constancio R. Alesna, Jose Bagogo Bernal, Daniel Rodriguez Ferreira, Yutaka Gohara, Cornel Iha, Nasashi Kageyama, Toroichi Kanda, Ralph Joseph Mendes, Frank Gonsalves Perreira, Noboru Takeuchi, Fred Taniguchi, and Genkichi Wada, and each of them, at Hanamaulu, in the County of Kauai, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 10th day of October, 1946, did unlawfully, feloniously and wilfully disobey said lawful order by then and there engaging in picketing with others, to the Grand Jurors unknown, in groups of more than three (3) pickets at points of ingress to and egress from the petitioner's property to wit: the Hanamaulu Shop and approaches thereto, said pickets then and there not being in motion and not maintaining a distance of ten (10) feet between each other, the said Constancio R. Alesna, Jose Bagogo Bernal, Daniel Rodriguez Ferreira, Yutaka Gohara, Cornel Iha, Nasashi Kageyama, Toroichi Kanda, Ralph Joseph Mendes, Frank Gonsalves Perreira, Noboru Takeuchi, Fred Taniguchi, and Genkichi Wada, and each of them, then and there having notice and knowledge of said lawful order and at all times herein mentioned being members of said International Longshoremen's and Warehousemen's Union (CIO), and Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), respondents hereinabove mentioned, and

so in manner and form aforesaid, they, the said Constancio R. Alesna, Jose Bagogo Bernal, Daniel Rodriguez Ferreira, Yutaka Gohara, Cornel Iha, Masashi Kageyama, Toroichi Kanda, Ralph Joseph Mendes, Frank Gonsalves Perreira, Noboru Takeuchi, Fred Taniguchi, and Genkichi Wada, and each of them, did unlawfully, feloniously and wilfully disobey said lawful order and were then and there and thereby in contempt of court, contrary to the form of the statute in such case made and provided.

A true bill found this 29th day of October, 1946.

/s/ WM. G. WEBER,

Foreman of the Grand Jury.

/s/ DUDLEY C. LEWIS,

Deputy Attorney General of
the Territory of Hawaii.

EXHIBIT B

In the Circuit Court of the Fifth Circuit
Territory of Hawaii

Eq. No. 120

At Chambers—In Equity

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), LO-
CAL 149 of the INTERNATIONAL LONG-
SHOREMEN'S AND WAREHOUSEMEN'S
UNION (CIO), Unit 1, Local 149, of the IN-
TERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO),
JOSEPH NUNES, DANIEL RAPOZO, FER-
NANDO FONTANILLA, THOMAS TAKE-
MOTO, SUNAO IWAMOTO, WILLIAM
PAIA, YOSHIKAZU MORIMOTO, BENJA-
MIN IIDA, GEORGE MASAKI, CHARLES
MORITA, RONALD TOYOFUKU, TAKU
AKAMA, JOHN DOE, MARY DOE, RICH-
ARD ROE, et al.,

Respondents.

AMENDED TEMPORARY RESTRAINING
ORDER

Territory of Hawaii to the International Long-
shoremen's and Warehousemen's Union (CIO),
Local 149 of the International Longshoremen's

and Warehousemen's Union (CIO), Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Roe, et al., Greetings:

Whereas, the Lihue Plantation Company, Limited, has filed herein a petition against you praying to be relieved touching the matters therein set forth; and

Whereas, an order to show cause issued from and under the seal of this Court ordering you to appear before the undersigned, Judge of the above entitled Court, on Friday, the 27th day of September, 1946, at the hour of 9 o'clock a.m., and [40]

Whereas, a Motion for Temporary Restraining Order was also filed and, by supporting affidavits and evidence adduced by the Petitioner at the time of the filing of the petition in the above entitled proceeding, it appeared that the acts therein specified and complained of will continue unless restrained pending a hearing on the petition in the above entitled proceedings; and

Whereas, pursuant to the prayer of said petition and the said motion, a Temporary Restraining Order was issued on the 17th day of September, 1946, and subsequently the Respondents, by Richard Gladstein, acting in their behalf and as their attorney, entered an appearance and presented an oral

motion to dissolve and vacate said Temporary Restraining Order, and a hearing thereon was had before the Court, to wit, the undersigned, the Circuit Judge of the Fifth Circuit, Territory of Hawaii, At Chambers, In Equity, Petitioners being represented thereat by Attorneys Montgomery E. Winn and E. C. Moore, of Vitousek, Pratt, and Winn and Dudley C. Lewis, Esq., Deputy Attorney General of the Territory of Hawaii, appearing at the request of the Court and as *amicus curiae*, and the Court, after hearing and considering argument on said motion having over-ruled the same and having given notice to the parties to appear at, and continued proceedings until the 23d day of September, 1946, so that the parties might then be advised if the Court should then, upon its own initiative, modify, the aforesaid Temporary Restraining Order;

Now Therefore, after consideration and deliberation, the Court does, on this 23d day of September, 1946, modify the aforesaid Temporary Restraining Order and

It Is Ordered that said Temporary Restraining Order be, and it hereby is modified to the extent hereof and by substitution therefor of this Amended Temporary Restraining Order: [41]

Wherefore, you, International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, Sunao Iwa-

moto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Roe, et al., are hereby restrained and enjoined until the further order of this Court from in any way

(1) Obstructing or attempting to obstruct, by massing of pickets or otherwise, the ingress to or egress from the Petitioner's mill, store or other plantation buildings or premises located in the County of Kauai, Territory of Hawaii, of the Petitioner, its employees, or any others who may enter or desire to enter said premises for the purpose of performing work or for other lawful occasion;

(2) Obstructing or attempting to obstruct, by massing of pickets or otherwise, freedom of movement on or along the public or private roads or ways in or about the Petitioner's premises, of the Petitioner, its employees, or any other persons who may pass or desire to pass on or along said roads or ways for the purpose of performing work or for other lawful occasion;

(3) Obstructing or attempting to obstruct the free movement in, on or about the Petitioner's premises, of the Petitioner, its employees, or any other persons who may be in, on or about said premises for the purpose of performing work or for other lawful occasion;

(4) Threatening violence to, intimidating, or coercing, or attempting to intimidate or

coerce, the employees of the Petitioner or those seeking employment with the Petitioner, or any persons who are lawfully upon the Petitioner's premises or [42] are proceeding to or from said premises;

(5) Coercing or intimidating, or attempting to coerce or intimidate, employees of the Petitioner or those seeking employment with the Petitioner, by means of threats concerning the safety or welfare of the families of such employees or the families of those seeking employment with the Petitioner; or threatening violence to, or coercing or intimidating, or attempting to coerce or intimidate, such families;

(6) Without express written consent of the occupants thereof, visiting or being at or about the dwelling houses or residence premises belonging to Petitioner and occupied by employees of or persons seeking employment with Petitioner and thereat being offensive, disorderly, threatening or intimidating (in words or actions) towards, and harassing, such occupants, or any of them;

(7) Mass picketing by assembling in compact groups or congregating in crowds on or near real property of the Petitioner, whether used for business or residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property by Petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property;

And In Furtherance Hereof, you are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets in a group at any point and station when stationed at points of ingress to and egress from the Petitioner's property, provided, however, that any pickets in excess of three (3) at any one point and station, shall be in motion and, except when passing each other, shall maintain a distance of not less than ten (10) feet between each other and such picketing as shall be done by them shall not be violative of any of the preceding restrictive [43] provisions hereof; all pickets being hereby enjoined from picketing other than in a peaceful and lawful manner and from obstructing /s/ PLR
~~interfering with~~ the petitioner, its employees, or any other persons lawfully seeking to enter or leave the Petitioner's premises; and all pickets being also enjoined from otherwise committing any of the acts hereinbefore prohibited. Any persons engaged in such picketing as is not hereby restricted or prohibited shall wear arm bands reading "Authorized Picket," or "U P."

Dated: Lihue, Kauai, T. H., September 23, 1946.

[Seal] /s/ PHILIP L. RICE,

Circuit Judge, Fifth Circuit,
Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ SAMUEL H. KIMURA,
File Clerk, Circuit Court, Fifth Circuit, Territory
of Hawaii.

[Endorsed]: Filed Jan. 31, 1947. [44]

District Court of the United States
for the District of Hawaii

Civil Action File No. 769

CONSTANCIO R. ALESNA, JOSE BAGOGO
BERNAL, DANIEL RODRIGUES FER-
REIRA, YUTAKA GOHARA, CORNEL
IHA, MASAHI KAGEYAMA, TOROICHI
KANDA, RALPH JOSEPH MENDES,
FRANK GONSALVES PERREIRA, NO-
BORU TAKEUCHI, FRED TANIGUCHI,
and GENKICHI WADA,

Plaintiff,

vs.

PHILIP L. RICE, as Judge of the Circuit Court
for the Fifth Judicial Circuit of the Territory
of Hawaii; and C. NILS TAVARES, as Attor-
ney General of the Territory of Hawaii,

Defendant.

SUMMONS IN A CIVIL ACTION

To the above named Defendant:

You are hereby summoned and required to serve
upon Harriet Bouslog, and Myer C. Symonds, plain-
tiff's attorneys, whose address is Room 206, Pier 11,
Honolulu (16), T. H., an answer to the complaint
which is herewith served upon you, within 20 days
after service of this summons upon you, exclusive of

the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk of Court.

Dated January 31, 1947. [45]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 1st day of February, 1947, I received the within summons and the same is returned duly executed as follows: On February 1, 1947, personal service was made on C. Nils Tavares, Attorney General of Territory of Hawaii, at Iolani Palace, by exhibiting the original Summons to him and by handing to and leaving with him a certified copy of said Summons.

On February 3, 1947, personal service was made on Philip L. Rice, Judge of the Circuit Court of the Fifth Judicial Circuit, Territory of Hawaii, at Iolani Palace by exhibiting the Original Summons to him and by handing to and leaving with him a certified copy of said Summons.

/s/ OTTO F. HEINE,
United States Marshal.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY
RESTRAINING ORDER

Upon the reading, filing and consideration of the verified complaint herein praying for an order directed to the defendants above named, to appear before the above entitled court on a day certain and show cause why a preliminary injunction should not be granted herein, enjoining and restraining said defendants from taking any further proceedings in connection with that certain indictment for Contempt pending in the circuit court of the fifth circuit, Territory of Hawaii, entitled "Territory of Hawaii v. Constancio Alesna, et al.," being Criminal No. 896 among the records of said court, or from proceeding with any contempt proceedings in connection with any alleged violation of the amended temporary restraining order issued in that certain action entitled [47] "The Lihue Plantation Company, Limited, v. International Longshoremen's and Warehousemen's Union (CIO), et al.," Equity No. 120 among the records of said court, and further praying that pending the hearing of the said Order to Show Cause a Temporary Restraining Order be issued herein, and

It appearing to the court from said complaint that if a temporary restraining order is not granted without notice, the plaintiffs herein will be required to appear on February 4, 1947, to defend themselves against the charge of criminal contempt of the said circuit court of the fifth judicial circuit for alleged violations of said Amended Temporary Restraining

Order, In Equity No. 120, by the defendant Philip L. Rice as Judge thereof, thereby depriving plaintiffs of alleged rights under the Constitution and laws of the United States before this court can determine on the merits the rights of plaintiffs to a decree of this court enjoining further proceedings in contempt, thereby causing irreparable injury to the plaintiffs, and the court being fully advised in the premises and it being a proper case for this order.

It Is Hereby Ordered that Philip L. Rice, as Judge of the circuit court for the fifth judicial circuit of the Territory of Hawaii; and C. Nils Tavares, as Attorney General of the Territory of Hawaii, defendants above named, be and they are hereby ordered to appear before the undersigned United States District Judge at his courtroom, Federal Building, Honolulu, T. H., on the 10th day of February, 1947, at the hour of 10 a.m. to show cause, if any they have, why the preliminary injunction prayed for in said petition should not be granted.

It Is Further Ordered that pending the hearing of said Order to Show Cause that said defendant, C. Nils Tavares as [48] Attorney General, his deputies, agents and representatives be, and they are hereby restrained and enjoined until the further order of this court from prosecuting or taking any further proceedings in that certain Indictment for Contempt pending in the circuit court of the fifth circuit, Territory of Hawaii, entitled "Territory of Hawaii v. Constancio Alesna, et al.," and being Criminal No. 896 among the records of said court, or from prosecuting or proceeding with any contempt proceedings in connection with any alleged

violation of the amended temporary restraining order issued in that certain action entitled "The Lihue Plantation Company, Limited, v. International Longshoremen's and Warehousemen's Union (CIO), et al.," Equity No. 120 among the records of said court.

It Is Further Ordered that a copy of this order together with a copy of the complaint and summons be served upon the defendants at least 6 days prior to the 10th day of February, 1947.

Dated: January 31st, 1947, at 2:43 p.m. at Honolulu, T. H.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

UNITED STATES MARSHAL'S RETURN

Received the within Order to Show Cause and Temporary Restraining Order this 1st day of February, 1947, and the same is returned duly executed this 1st day of February, 1947, by personally exhibiting the Original Writ to Philip L. Rice, as Judge of the Circuit Court, for the Fifth Judicial Circuit of the Territory of Hawaii, and to C. Nils Tavares, Attorney General of the Territory of Hawaii, and by handing to and leaving with each of them a certified copy of the original Order to Show Cause and Temporary Restraining Order.

OTTO F. HEINE,

U. S. Marshal.

By /s/ GEORGE E. BRUNS,

Deputy. [50]

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS TO ALLOW- ANCE OF PRELIMINARY INJUNCTION

Come now defendants Philip L. Rice, Judge of the Circuit Court of the Fifth Circuit, Territory of Hawaii, and C. Nils Tavares, Attorney General of the Territory of Hawaii, and present the following objections to the allowance of a preliminary injunction in the above entitled matter:

I.

This Court has no jurisdiction to issue an injunction against the judge of a circuit court of the Territory of Hawaii.

II.

The judge of a circuit court of the Territory of Hawaii cannot properly be made a party to a proceeding in which an injunction is sought to restrain the prosecution of a proceeding pending before such circuit court.

III.

It affirmatively appears on the face of the complaint [52] filed herein that this Court has no jurisdiction to grant the relief prayed for therein, for the reason that this Court is without jurisdiction in equity to enjoin proceedings pending in a circuit court of the Territory of Hawaii to enforce the criminal laws of the Territory.

IV.

Said complaint fails to state a claim for equitable relief in that it fails to show that such relief is necessary to prevent irreparable injury to the plaintiffs, or any other ground for equitable relief.

Dated at Honolulu, T. H., this 8th day of February, 1947.

PHILIP L. RICE,

Judge of the Circuit Court for the Fifth Judicial
Circuit of the Territory of Hawaii, and

C. NILS TAVARES,

Attorney General of the Territory of Hawaii,
Defendants.

By /s/ MICHIO WATANABE,

Deputy Attorney General,
Their Attorney.

Service of a copy of the within objections this
day admitted.

Dated: Honolulu, Feb. 8, 1947.

/s/ HARRIET BOUSLOG,

/s/ MEYER C. SYMONDS,

Attorneys for Plaintiffs.

[Endorsed]: Filed Feb. 10, 1947.

In the United States District Court for the
Territory of Hawaii

Civil No. 769

CONSTANCIO R. ALESNA, et al.,

Plaintiffs,

vs.

PHILIP L. RICE, as Judge of the Circuit Court
for the Fifth Judicial Circuit of the Territory
of Hawaii; and C. NILS TAVARES, as Attor-
ney General of the Territory of Hawaii,
Defendants.

Before: Hon. J. Frank McLaughlin,
Judge.

RULING UPON MOTION FOR A PRELIMINARY INJUNCTION

Appearances:

Harriet Bouslog, Meyer C. Symonds, Attorneys
for Plaintiffs.

C. Nils Tavares, Attorney General, and Michiro
Watanabe, Deputy Attorney General, Attorneys for
Defendants.

The Plaintiffs bring this action under the Civil
Rights Act, 28 U.S.C., Section 41(14), alleging upon
four different grounds the deprivation under color
of Territorial law of rights guaranteed to them by
the Constitution and laws of the United States.

Upon application and in accord with 28 U.S.C.,
Section 381, Rule 65, Federal Rules of Civil Pro-

cedure, a Restraining Order was issued *ex parte*. An Order to Show Cause was returnable upon the tenth day thereafter, and as the argument was not concluded the Restraining Order was extended under the Rule an additional ten days.

The question—and the only question now before the Court—is whether or not, pending a hearing upon the merits, a Temporary Injunction should issue.

The case arises out of the recent Territorial-wide strike of all sugar plantation workers. Upon the Island of Kauai the Lihue Plantation Company, Limited, applied in a proceeding in equity to the Judge of the Territorial Circuit Court for the Fifth Judicial Circuit for injunctive relief against certain aspects of picketing then being carried on by the unionized strikers. The Territorial Judge issued *ex parte* a Restraining Order restricting certain phases of picketing by the defendants in that case. Thereafter the defendants moved to dissolve it as having been issued contrary to the provisions of the Norris-La Guardia Act. Judge Rice denied [55] the motion but subsequently upon his own motion amended the Restraining Order which he had previously issued. Insofar as is here pertinent, the Restraining Order as amended prohibited the defendants from

(a) Engaging in mass picketing on or near company business or residence property for the purpose of preventing, obstructing or interfering with ingress or egress to such property; and

(b) Using more than three (3) pickets at points of ingress to or egress from company property, and directing that at all other points where more than three (3) pickets were used that such pickets should be in motion and, except when passing each other, a distance of ten (10) feet between each picket should be maintained.

The Plaintiffs here were indicted upon two counts by the Grand Jury of the Territorial Fifth Circuit Court for criminal contempt of court in that, as alleged in the indictment, they wilfully violated the **Restraining Order**

(1) By mass picketing with others on or near company property to prevent, obstruct, and interfere with ingress and egress thereto; and

(2) By picketing with others in groups in excess of three at points of ingress to and egress from company property, and also by failing to keep in motion and by failing to maintain a distance of ten (10) feet between each other.

Thereafter, in a case in the Second Circuit Court arising [56] out of a similar situation upon the Island of Maui, upon a Petition for a Writ of Prohibition, the Territorial Supreme Court was called upon to decide whether or not the Norris-La Guardia Act applied to the Territorial Circuit Courts. In a decision dated December 4, 1946, the Supreme Court of Hawaii held that that Act did not apply to the Territorial Courts. (37 Hawaii 404) A Petition for Rehearing was denied by that Court

on January 23, 1947 (37 Hawaii), and an appeal has been taken to the Circuit Court of Appeals for the Ninth Circuit.

The Plaintiffs came to this Court January 31, 1947, and upon the basis of the allegations contained in the complaint—which included an allegation that the criminal case against Plaintiffs was set for plea and trial in the Fifth Circuit Court on February 4, 1947 (now reset for February 26th)—asked, *ex parte*, for an order restraining Judge Rice and the Territorial Attorney General from proceeding with the criminal case in the Fifth Circuit Court until further order of this Court.

Because of the nature of the case, the importance of the questions of law involved, and the facts and circumstances surrounding it, as has been stated, a Restraining Order issued, but only against the Territorial Attorney General, his deputies and assistants. The Defendant Judge and Attorney General were directed to show cause why a Preliminary Injunction should not issue as prayed for.

In reply, the Defendants state that

(1) This Court has no jurisdiction to enjoin Territorial Judge Rice;

(2) The Judge is not a proper party to a suit such as this;

(3) The complaint shows that this Court has no jurisdiction, for this Court cannot enjoin a criminal action pending in a Territorial Court; and

(4) That the complaint shows no grounds for equitable relief.

Plaintiffs, of course, state that Defendants' objections are not well taken, and affirmatively assert rights guaranteed to them by the Constitution and laws of the United States are being denied them by the Territory and one of its Courts in that

(a) The Norris-La Guardia Act does apply to the Territorial Courts,—hence, Judge Rice's amended Restraining Order was void—the Plaintiffs have been indicted for violating a void order of Court, and are being forced to defend themselves against such an indictment in a Court which has already ruled out the Norris-La Guardia Act and the hands of which on the point are now tied, in any event, by the ruling of the Territorial Supreme Court;

(b) If the Norris-La Guardia Act does not apply to the Territorial Courts, the same consequences above outlined follow [58] in any event, for it must then be that this Court, the United States District Court for the Territory of Hawaii, has been given by Congress exclusive power in the Territory to issue injunctions in labor dispute cases in conformity with the Norris-La Guardia Act and hence Judge Rice's Restraining Order was void;

(c) The laws of the United States grant Plaintiffs, members of a union, substantive rights which no Court can restrain in the absence of fraud or violence; that Judge Rice's Restraining Order is void, for it prohibited the free exercise of, and the indictment based thereon alleges it to have been a criminal

offense to have exercised, rights granted to members of a union by United States laws. In brief, it is said Plaintiffs are being charged criminally for doing what Congress gave them as members of a union a right to do.

And finally that

(d) Judge Rice's Order and the indictment based upon it deprived Plaintiffs of rights guaranteed to them by the Constitution in that the right to picket is an exercise of the rights of free speech and of assembly.

OPINION

My answers to the questions presented are:

I.

The Norris-La Guardia Act does not apply—directly—to the Territorial Judiciary. [59]

Although those courts fall squarely within the phrase "Court of the United States" as defined in the Act (29 U. S. Code, Section 113(d)), it is to me satisfactorily clear from the nature of the Territorial Government created by the Organic Act (48 U.S.C., Section 491) and the objective sought to be attained by Congress in passing the Norris-La Guardia Act that it was never meant to apply to the Territorial Courts.

In organizing this Territory, Congress gave to the local government which it created broad domestic powers, and it separated that local government from the operations within the Territory of the Fed-

eral Government. Congress gave to the Territory a form of organization more like that of a State than it had previously given to any like area. (See *Puerto Rico vs. Shell Co.*, 302 U. S., 253.) Insofar as the Territorial Courts are concerned, Congress itself recognized the distinction between the Territorial Courts and the U. S. District Court for the Territory of Hawaii (48 U.S.C., Section 645). As pointed out in *Wilder's Steamship Company vs. Hind*, 108 Federal, 113, at 115-116, years ago

“The system of courts created by the act for the Territory of Hawaii differs radically from the system of courts which Congress had theretofore created for any of the territories. In no other territory has there been a division of jurisdiction between cases which properly belong to the courts of the United States and other cases. Congress found in the Republic of [60] Hawaii a system of courts already established, whose jurisdiction was complete, and from the highest tribunal of which there was no appeal. To that system Congress, by the act, added a district court, conferring upon it the jurisdiction which pertains to the district and circuit courts of the United States, and providing for removing to that court from the Territorial courts causes which under the removal acts were removable from a state court to a court of the United States.” (See also *Yeung vs. Territory of Hawaii*, 132 Federal 2nd, 374.)

There is no intent revealed in either the act or its history which requires that the distinction between the Territorial courts and the Federal Court for the Territory of Hawaii was to be obliterated. Congress on the contrary spoke of an intent not to disturb domestic jurisdiction.

Further, as designed the Norris-LaGuardia Act does not fit the Territorial court system. 29 U.S.C., Section 110, provides for appeals from the granting or denial of a preliminary injunction to the Circuit Court of Appeals, which in this instance would be the Ninth Circuit Court of Appeals. Such an appeal from the Territorial Circuit Courts is not possible. From those courts appeals lie to the Territorial Supreme Court.

Basically, although "courts of the United States" in a very wide, general sense, the Territorial courts are not within the Norris-LaGuardia Act because Congress was aiming [61] at, and only at, the District Courts of the United States and the Circuit Courts of Appeal. A reading of the legislative history leaves no doubt upon the point. The evil sought to be remedied was the issuance of blanket injunctions against labor for little if any reason by the Federal Courts in labor dispute cases in contravention of the will of Congress as set forth in the Clayton Act. (29 U.S.C., Section 52. See *U. S. v. Hutcheson*, 312 U. S. 219.) In curing the evil by the passage of the Norris-LaGuardia Act Congress had no other courts in mind. It saw the source of the trouble and set about to remedy it, as it did, by curtailing the powers of the Federal judiciary—and none other.

II.

The Norris-LaGuardia Act does not apply to this Court.

The Act curtails and restricts the equity powers of the Federal Court to the same extent that it affects like powers held by Constitutional Federal Courts. In passing this legislation Congress gave not a moment's thought, to be sure, to Legislative Federal Courts as such. As to courts, the discussions were generally in terms of "inferior" courts, "inferior" Federal courts and "Federal" courts. But, nevertheless, the thing of importance to note was that Congress was dealing with equity power possessed by any Federal Court. This Court, although legislative, not only comes within the terms of 29 U.S.C., Section 113(d), but additionally is within the target [62] area reached by the Congress through the Norris-LaGuardia Act, for it has equity powers identical to those held by Constitutional Federal Courts. (48 U.S.C., Section 642.)

To arrive at any other conclusion than that the Act applies directly and squarely to this Court would not only be to construe the Act in a "spirit of mutilating narrowness" (see *U. S. vs. Hutcheson*, *supra*) while fully aware of what Congress was "driving at," but would further bring about the absurd result that this Legislative U. S. District Court has more power today than a Constitutional U. S. District Court.

III.

This Court has not been given exclusive jurisdiction to issue, upon compliance with the Norris-LaGuardia Act, injunctions in labor disputes.

The opposing contention is based upon the Sherman Act, 15 U.S.C., Section 3, giving this Court jurisdiction over violations of that law in Hawaii. Relying upon the *Hutcheson* case, *supra*, to the effect that the Sherman Act, the Clayton Act and this Act, the Norris-LaGuardia Act, must be read together as one integrated piece of legislation, it is argued that the amendatory act must be accorded the same geographical scope.

It is a fascinating and in many respects plausible argument, and under the *Hutcheson* case it is difficult to put a finger upon just why the second proposition does not follow from the [63] first. But I am not satisfied that the argument is sound.

Of all injunctions sought upon the theory that the complained of labor activity is an unlawful restraint upon Territorial commerce, this Court would have exclusive jurisdiction. But to hold, as plaintiffs urge, in the absence of specific language in the statute that the Territorial Courts are powerless to act by injunction in a case arising out of a labor dispute would be in my opinion judicial legislation.

Professing no intention to interfere with the equitable powers of the state courts—which of course it couldn't affect directly—it seems to me also reasonable to believe, in the absence of contrary language, that Congress had no reason, desire, or intention to deprive, as it could have, the domestic courts of Hawaii of any part or all of their equity power.

IV.

However, in this case, and with reference to the facts alleged and the law involved in the plaintiffs' third and fourth causes of action, a preliminary injunction should and therefore will issue.

How can it issue? There is a criminal proceeding pending in a Territorial Court, and 28 U.S.C., Section 379—which because of 48 U.S.C., Section 645 applies to this Court—says that no court of the United States shall enjoin proceedings in State or Territorial Courts. The answer is that the statute directing the observance of the principles of comity between [64] courts exercising different powers in the same area is not jurisdictional, and has recognized exceptions. (*Toucey vs. New York Life Insurance Co.*, 314 U. S. 118.)

Where exceptional circumstances of peculiar urgency are shown to exist, a Federal court may interfere with a State court or Territorial court for the purpose of inquiring whether or not a person is being held in violation of the Constitution and laws of the United States. (*Ex parte Royall*, 117 U.S. 241; *United States, Ex Rel. Kennedy, et al., vs. Tyler, Sheriff, et al.*, 269 U.S. 13; *United States Ex Rel, Murphy vs. Mruphy*, 108 Fed. 2nd 861; *United States Ex Rel. Buchalter vs. Lowenthal*, 108 Fed 2nd 863.) This power is exercisable by injunction as well as by writ. It is well settled that equitable jurisdiction exists to restrain criminal prosecutions under un-Constitutional enactments when the prevention of such prosecutions is essential to safeguard property rights. (See *Pughe vs.*

Patton, 21 Fed. Sup. 183, and cases there collected.) As pointed out recently by the Supreme Court of Massachusetts in a somewhat similar case, if equity can protect the right to sell bananas, there is no reason historical or otherwise why it cannot act to protect personal rights and rights guaranteed by the Constitution. (See *Kanyon vs. City of Chicopee*, Dec. 9, 1946, 15 Law Week, 2366.) And so, I am satisfied of the existence of the power to grant both the temporary and ultimate remedy asked for.

Now, should—or more pointedly—why should a preliminary injunction issue? Because in the absence of any Territorial law, and in the light of the definite Federal laws relating to permissible labor conduct—which laws the Territorial courts, too, must respect—there seems here to be a substantial question as to whether or not that which under Federal law may be allowable conduct can—by restrictions placed thereon by a court, however reasonable they might be—become, as the Supreme Court says, “the road to prison.” (See *U.S. vs. Hutcheson*, 312 U.S. 219; *Thornhill vs. Alabama*, 310 U.S. 88; *Hague vs. CIO*, 307 U.S. 507.)

In brief, with no questions of Territorial law involved at all, it looks as if Plaintiffs are in jeopardy because they did things which Federal law allowed. Before exposing Plaintiffs to the risks of trial for criminal contempt of court, I believe the questions of law posed under these facts should be further examined.

But I see no good reason why the preliminary injunction which will issue should enjoin the Judge

of the Fifth Circuit Court. Effective relief can be attained by restraining the hand of the Attorney General as effective relief ex parte was similarly granted at the time of the issuance of the Restraining Order. And, therefore, the Preliminary Injunction will be like the Restraining Order issued only to the Attorney General. A Preliminary Injunction in substantially the same form as the Restraining Order will suffice, and such will be signed on presentation.

[Endorsed]: Filed Feb. 25, 1947.

In the United States District Court for the
District of Hawaii

Civil Number 769

CONSTANCIO R. ALESNA, et al.,

Plaintiffs,

vs.

PHILIP L. RICE, as Judge of the Circuit Court
for the Fifth Judicial Circuit of the Territory
of Hawaii, et al.,

Defendants.

PRELIMINARY INJUNCTION

An order to show cause having been issued herein on the 31st day of January, 1947, directed to Philip L. Rice, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii, and C. Nils Tavares, as Attorney General of the Territory

of Hawaii, defendants above named, ordering them to appear before the undersigned, Judge of the United States District Court for the Territory of Hawaii, on February 10, 1947, at 10:00 a.m. to show cause why a preliminary injunction enjoining them from taking any further proceedings in connection with that certain Indictment for contempt pending in the circuit court of the fifth circuit, Territory of Hawaii, entitled "Territory of Hawaii vs. Constancio R. Alesna, et al.," being Criminal No. 896 among the records of said court, or from proceeding with any contempt proceedings in connection with any alleged violation of the amended temporary restraining order issued in that certain action entitled "The Lihue Plantation Company, Limited, vs. International Longshoremen's and Warehousemen's Union (CIO), et al.," Equity No. 120 among the records of said court; and a Temporary Restraining Order having been issued against the defendant, C. Nils Tavares as Attorney General, his deputies, agents and representatives; and the said Philip L. Rice and C. Nils Tavares having filed "Defendants' Objections to Allowance of Preliminary Injunction"; and the matter having come on regularly to be heard on the 10th day of February, 1947; and the plaintiffs appearing by their attorneys, Harriet Bouslog and Myer C. Symonds, and the defendants appearing in person and by Michiro Watanabe, Deputy Attorney General, Their Attorney; and the matter having been orally argued on said February 10, 1947 and on February 11, 1947, and the matter having been on said February 11, 1947, submitted

for decision and the said restraining order having been extended by order of court to February 20, 1947.

The court finds that if a preliminary injunction is not granted the plaintiffs will suffer irreparable injury and for the reasons stated in the Opinion of this Court dated this day and filed herein, and the court being fully advised in the premises and it being a proper case for this order,

It is hereby ordered that the defendant, C. Nils Tavares as Attorney General, his deputies, agents and representatives be, and they are hereby restrained and enjoined until the further order of this court from prosecuting or taking any further proceedings in that certain Indictment for Contempt pending in the circuit court of the fifth circuit, Territory of Hawaii, entitled "Territory of Hawaii vs. Constancio R. Alesna, et al.," and being Criminal No. 896 among the records of said court, or from prosecuting or proceeding with any [69] contempt proceedings in connection with any alleged violation of the amended temporary restraining order issued in that certain action entitled "The Lihue Plantation Company, Limited vs. International Longshoremen's and Warehousemen's Union (CIO), et al.," Equity No. 120 among the records of said court.

Dated: February 20, 1947, at 1:52 p.m., at Honolulu, T. H.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

UNITED STATES MARSHAL'S RETURN

The within Preliminary Injunction was received by me on the 21st day of February, A.D. 1947, and the same is returned duly executed this 21st day of February, A.D. 1947, by personally handing to and leaving with C. Nils Tavares, as Attorney General of the Territory of Hawaii, at Honolulu, T. H. a certified copy of the within Preliminary Injunction.

Dated at Honolulu, T. H. this 21st day of February, A.D. 1947.

OTTO F. HEINE,

U. S. Marshal, District of
Hawaii.

By /s/ EMMANUEL U. MOSES, JR.,
Deputy. [71]

In the United States District Court for the
District of Hawaii

Civil No. 769

CONSTANCIO R. ALESNA, et al.,

Plaintiffs,

vs.

PHILIP L. RICE, as Judge of the Circuit Court
of the Fifth Judicial Circuit of the Territory
of Hawaii; and C. NILS TAVARES, as Attor-
ney General of the Territory of Hawaii,
Defendants.

ANSWER TO COMPLAINT

Philip L. Rice, Judge of the Circuit Court of the
Fifth Circuit of the Territory of Hawaii, for an-

swer to the complaint herein, asserts the following defenses in law and fact, to wit:

Answer to the Averments of the Complaint

Answering paragraphs numbered I to XVII, inclusive, of the first cause of action alleged in said complaint:

I.

Defendant denies each and every allegation contained in paragraph I thereof.

II.

Defendant admits the allegations in paragraphs II and III thereof. [73]

III.

Answering paragraph IV thereof, defendant admits that C. Nils Tavares was the regularly appointed and acting Attorney General of the Territory of Hawaii on the date of said complaint, but alleges that said C. Nils Tavares is no longer Attorney General.

IV.

Defendant denies each and every allegation in paragraph V thereof.

V.

Defendant admits the allegations in paragraph VI thereof, except that defendant alleges that the petition prayed for an order to show cause why an injunction should not issue, and a motion was filed praying for a temporary restraining order, as more fully appears in Exhibit A hereto annexed.

VI.

Defendant admits the allegations in paragraph VII thereof, except that defendant denies that the issuance of the temporary restraining order mentioned in said paragraph was in contravention of the Clayton and Norris-La Guardia Acts mentioned in said paragraph, the Constitution of the United States, or any other law and except that defendant alleges that his holding with respect to the Norris-La Guardia Act related only to the application thereof to the circuit courts and circuit judges of the Territory. [74]

VII.

Defendant admits the allegations in paragraphs VIII and IX thereof.

VIII.

Answering the allegations in paragraph X, defendant denies that the Circuit Court of the Fifth Circuit of the Territory of Hawaii is a court of the United States as defined in said Norris-La Guardia Act; and, admitting that under the terms of said Act no court of the United States has jurisdiction to issue a restraining order or temporary or permanent injunction in a labor dispute without strictly complying with the terms and conditions of said Act and that no such court may under said Act restrain certain activities designated by said Act, defendant alleges that such provisions do not apply to the circuit courts of the Territory of Hawaii or the circuit judges presiding at chambers in equity in said Territory.

IX.

Defendant denies each and every allegation in paragraph XI, except that defendant admits that the court in issuing the restraining orders mentioned in said paragraph did not comply with the provisions of the Norris-La Guardia Act.

X.

Defendant denies each and every allegation in paragraph XII thereof. [75]

XI.

Defendant denies each and every allegation in paragraphs XIII and XIV, except that defendant admits that the indictment referred to in said paragraph XIII is predicated upon violation of the amended temporary restraining order heretofore issued by the defendant as Circuit Judge Presiding at Chambers in Equity of said Fifth Circuit, that the proceedings under said indictment have been and still are pending before the Circuit Court of the Fifth Circuit and that said matter is on the calendar of said court for further proceedings on August 25, 1947.

XII.

Answering paragraph XV thereof, defendant re-asserts the defenses set out in paragraph III of this answer.

XIII.

Defendant denies each and every allegation in paragraph XVI and XVII thereof.

Answering paragraphs I and II of the second cause of action alleged in said complaint:

XIV.

Defendant repeats and realleges each and every allegation contained in paragraphs I to VII and X to XIII, both inclusive, of this answer, with the same force and effect as if repeated at length in this paragraph. [76]

XV.

Defendant denies each and every allegation contained in paragraph II of the second cause of action, except that defendant admits that it appears in the petition referred to in said paragraph that the order prayed for in said petition was to restrain trade unions and officers and members thereof involved in a labor dispute with the petitioner in said petition.

Answering paragraphs I and II of the third cause of action alleged in said complaint:

XVI.

Defendant repeats and re-alleges each and every allegation contained in paragraphs I to VII and X to XIII, both inclusive, of this answer, with the same force and effect as if repeated at length in this paragraph.

XVII.

Defendant denies each and every allegation in paragraph II of the third cause of action. With respect to the allegations as to the contents of the amended temporary restraining order and indict-

ment referred to in said paragraph, the same being allegations of law and the exhibits attached to the complaint containing the full text of said amended temporary restraining order and indictment, said allegations require no answer.

Answering paragraphs I to XV, inclusive, of the fourth cause of action alleged in said complaint:

XVIII.

Answering paragraphs I to IX of said fourth cause of action, defendant repeats and re-alleges each and every allegation contained in paragraphs I to VII, inclusive, of this answer, with the same force and effect as if repeated at length in this paragraph.

XIX.

Defendant denies each and every allegation in paragraph X of said fourth cause of action.

XX.

Defendant denies each and every allegation in paragraphs XI and XII of said fourth cause of action, except that defendant admits that the indictment referred to in said paragraph XII is predicated upon violations of the amended temporary restraining order heretofore issued by the defendant as Circuit Judge presiding at Chambers in Equity of said Fifth Circuit, that the proceedings under said indictment have been and still are pending before the Circuit Court of said Fifth Circuit and that said matter is on the calendar of said court for further proceedings on August 25, 1947.

XXI.

Answering paragraph XV thereof, defendant re-asserts the defenses set out in paragraph III of this answer.

XXII.

Defendant denies each and every allegation contained in paragraphs XVI and XVII of said fourth cause of action. [78]

XXIII.

Further answering said complaint, defendant denies each and every allegation in said complaint not herein admitted, or heretofore controverted or specifically denied.

XXIV.

For a further, separate and distinct defense, defendant alleges that the amended temporary restraining order referred to in said complaint was issued by defendant as Circuit Judge Presiding at Chambers in Equity in the Fifth Circuit, Territory of Hawaii, strictly in accordance with the powers vested in him as a Circuit Judge at Chambers; that, as alleged in paragraph VI of the first cause of action alleged in said complaint and admitted in paragraph V of this answer, a petition for injunction was filed in said court on September 17, 1946, in a cause numbered and entitled, Equity No. 120, Lihue Plantation Company, Limited, vs. ILWU (CIO), et al.; that on said date, an ex parte hearing was held before said court at which the court raised

on its own motion the question of its jurisdiction in the matter, particularly as to the effect thereon of the provisions of the Norris-LaGuardia and National Labor Relations Acts; that the question of the court's jurisdiction was argued at length by counsel for the petitioner with extensive citation of authorities; that at such hearing twenty-three affidavits were received in evidence and the testimony of nine witnesses was taken and heard by the court; that such evidence was deemed by the court to constitute a *prima facie* [79] showing that the respondents in said cause had exceeded the bounds of peaceful picketing and that the petitioner therein was threatened with irreparable injury; that pursuant to the prayer of said petition and a motion for temporary restraining order, an order to show cause and a temporary restraining order were issued upon the conclusion of said hearing; that at a hearing held on September 20, 1946, a motion to vacate and dissolve said temporary restraining order was orally presented by counsel for respondents, which the court denied after extensive argument by counsel for the parties and *amicus curiae*; that at the conclusion of said hearing, the cause was continued to September 23, 1946, at which time the court desired to take up, on its own motion, the matter of a possible modification of said temporary restraining order; that upon a hearing held on September 23, 1946, an amended temporary restraining order was entered by the court; that at such hearing, the absence of counsel for respondents was

noted, which was explained by a telegram received by the court from the regional director of the respondent union stating that their counsel were instructed not to appear at such hearing since the respondent union saw no purpose in being represented at a hearing to modify an order which it considered void in the first place; that said petition, summons, order to show cause and temporary restraining order were duly served on respondents severally, some on September 17, 1946, and others on September 21, 1946, and September 23, 1946; that pursuant to an [80] order for service, said amended temporary restraining order was also duly served on the respondents severally on September 23, 1946, September 24, 1946, and October 31, 1946; that on September 27, 1946, at the request of respondents and pursuant to the stipulation of the parties, an order was entered by the court extending the time within which respondents were to respond to the order to show cause to October 7, 1946, and a stipulation of the parties extending respondents' time to answer said petition to October 7, 1946, was approved by the court; that by stipulations and an order filed and entered on October 4, 1946, the matter was further continued to November 18, 1946; that on November 18, 1946, the matter was continued without day; that all of the matters alleged in this paragraph appear in the records and files of the Circuit Court of the Fifth Circuit, Territory of Hawaii, in that cause numbered and entitled, Equity No. 120, Lihue Plantation Company, Lim-

ited, vs. ILWU (CIO), et al.; that attached hereto and incorporated herein by reference are a certified copy of the records and files of said Circuit Court in said matter, marked Exhibit A, and a true and correct transcript of evidence taken at the hearing on September 17, 1946, marked Exhibit B.

Defenses in Law

XXV.

The complaint fails to state a cause of action for equitable relief in that criminal proceedings in the course [81] of which and on review of which all defenses may be asserted, heard and determined by the circuit and supreme courts of the Territory, and, to the extent asserted under the laws and Constitution of the United States, by the Circuit Court of Appeals of the Ninth Circuit and the Supreme Court of the United States, do not constitute a threat of irreparable injury.

XXVI.

The complaint fails to state a cause of action for equitable relief in that it appears upon the face of the complaint that it seeks to stay proceedings pending in a circuit court of the Territory, and that the case does not relate to any proceeding in bankruptcy.

XXVII.

This court has no jurisdiction to issue an injunction against the judge of a circuit court of the Territory of Hawaii.

XXVIII.

The judge of a circuit court of the Territory of Hawaii cannot properly be made a party to a proceeding in which an injunction is sought to restrain further proceedings in an action pending before such circuit court.

XXIX.

The complaint fails to state a cause of action for equitable relief or any other relief.

XXX.

The complaint fails to state a cause of action in that, as appears on the face of the complaint, the amended temporary restraining order issued in that certain [82] equity action numbered 120, appended to the complaint, was issued by the Honorable Philip L. Rice, Judge of the Circuit Court of the Fifth Circuit, Territory of Hawaii, in the exercise of his powers as a circuit judge at chambers of the Territory of Hawaii.

That a Circuit Judge at Chambers of the Territory of Hawaii, pursuant to the Hawaiian Organic Act and the laws of the Territory of Hawaii, is a court of general jurisdiction with full equity powers and that its orders must be obeyed by persons subject to the jurisdiction of said court, until and unless set aside or reversed; that this is true whether or not the action of the court in issuing said amended temporary restraining order was

erroneous; that the said Circuit Court has jurisdiction to determine its own jurisdiction, and that violations of its amended temporary restraining order constitute criminal contempt irrespective of the ultimate disposition of the questions relating thereto raised herein by the plaintiffs' first and second causes of action, based on the Norris-LaGuardia and Clayton Acts; that the said Circuit Court has jurisdiction to determine questions of constitutional law, with power to issue an ex parte order for the purpose of preserving rights alleged to be unlawfully invaded to the irreparable injury of the petitioners in the territorial court, pending the return on the order to show cause why an injunction should not issue; and that violations of the amended temporary restraining order issued by defendant constitute criminal [83] contempt irrespective of the ultimate disposition of the questions raised herein by plaintiffs' third and fourth causes of action, based on the Norris-LaGuardia and Clayton Acts and the Constitution of the United States.

Dated at Honolulu, T. H., this 21st day of July, 1947.

/s/ RHODA V. LEWIS,

Acting Attorney General,

Attorney for Defendants.

EXHIBIT A

In the Circuit Court of the Fifth Circuit,
Territory of Hawaii

At Chambers—In Equity

Equity No. 120

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), LO-
CAL 149 of the INTERNATIONAL LONG-
SHOREMEN'S AND WAREHOUSEMEN'S
UNION (CIO), Unit 1, Local 149 of the IN-
TERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), JO-
SEPH NUNES, DANIEL RAPOZO, FER-
NANDO FONTANILLA, THOMAS TAKE-
MOTO, SUNAO IWAMOTO, WILLIAM
PAIA, YOSHIKAZU MORIMOTO, BENJA-
MIN IIDA, GEORGE MASAKI, CHARLES
MORITA, RONALD TOYOFUKU, TAKU
AKAMA, JOHN DOE, MARY DOE, RICH-
ARD ROE, et al.,

Respondents.

CERTIFICATE OF DEPUTY CLERK
OF COURT

I, John Ilalaole, Jr., Deputy Clerk of the Cir-
cuit Court, Fifth Circuit, Territory of Hawaii, do

hereby certify that I have examined the files of said court and particularly the folder wherein are filed all pleadings, orders, exhibits, and papers pertinent to or in the above-entitled matter in equity and which are filed or of record therein and in said court and that such include and there is no other than those as follows:

(1) Petition for Injunction, Order to Show Cause.

(2) Petitioner's Exhibit No. 1—Affidavit of Ronald G. Watt.

(3) Petitioner's Exhibit No. 2—Affidavit of Keith B. Tester.

(4) Petitioner's Exhibit No. 3—Affidavit of Antone Camara.

(5) Petitioner's Exhibit No. 4—Affidavit of Hale C. Cheatham.

(6) Petitioner's Exhibit No. 5—Affidavit of Wm. A. H. Buddingh. [86]

(7) Petitioner's Exhibit No. 6—Affidavit of Norbert Penna.

(8) Petitioner's Exhibit No. 7—Affidavit of Courtland E. Ashton.

(9) Petitioner's Exhibit No. 8—Affidavit of Leonard T. Cannon.

(10) Petitioner's Exhibit No. 9—Affidavit of Alexander G. Hutton.

(11) Petitioner's Exhibit No. 10—Affidavit of Harry Nogami.

(12) Petitioner's Exhibit No. 11—Affidavit of Courtland E. Ashton.

(13) Petitioner's Exhibit No. 12—Affidavit of Wm. A. H. Buddingh.

(14) Petitioner's Exhibit No. 13—Affidavit of Ronald G. Watt.

(15) Petitioner's Exhibit No. 14—Affidavit of John S. Carvalho.

(16) Petitioner's Exhibit No. 15—Affidavit of Mary Soares.

(17) Petitioner's Exhibit No. 16—Affidavit of Georgina Rosa.

(18) Petitioner's Exhibit No. 17—Affidavit of Mr. and Mrs. Antone Camara.

(19) Petitioner's Exhibit No. 18—Affidavit of Charles J. Fern.

(20) Petitioner's Exhibit No. 19—Affidavit of C. E. S. Burns.

(21) Petitioner's Exhibit No. 20—Affidavit of John Travasso.

(22) Petitioner's Exhibit No. 21—Affidavit of Frank Barretto.

(23) Petitioner's Exhibit No. 22—Affidavit of Ira W. Newton.

(24) Petitioner's Exhibit No. 23—Affidavit of James P. Langley.

(25) Petitioner's Exhibit No. 24—Letter from Y. Morimoto, Business Agent, ILWU, Local 149, to Lihue Plantation Company, Ltd.

- (26) Clerk's Minutes—September 17, 1946.
- (27) Motion for Temporary Restraining Order.
- (28) Order to Show Cause.
- (29) Temporary Restraining Order.
- (30) Chambers Summons. [87]
- (31) Telegram Received from C. Nils Tavares to Judge Philip L. Rice.
- (32) Clerk's Minutes—September 20, 1946.
- (33) Court's Exhibit No. 1—Radiogram received from Jack Hall, Regional Director, ILWU.
- (34) Clerk's Minutes—September 23, 1946.
- (35) Amended Temporary Restraining Order.
- (36) Order for Service of Copies of Amended Temporary Restraining Order.
- (37) Officer's Returns on Temporary Restraining Order.
- (38) Officer's Returns on Amended Temporary Restraining Order.
- (39) Radiogram received from Richard Gladstein & Montgomery Winn.
- (40) Stipulation and Order Extending Time on Order to Show Cause.
- (41) Stipulation Extending Time.
- (42) Clerk's Minutes—September 27, 1946.
- (43) Stipulation Extending Time.
- (44) Stipulation and Order Extending Time on Order to Show Cause.

(45) Transcript of Oral Motion on behalf of Respondents to Dissolve and Vacate the Temporary Restraining Order, and Oral Decisions and Ruling of the Court on said Motion.

(46) Officer's Returns on Amended Temporary Restraining Order.

(47) Clerk's Minutes—November 18, 1946.

I further certify that the hereinabove specified and listed pleadings, orders, exhibits, and papers constitute all of the record of and in the above-entitled equity matter at the date hereof and that a certified copy of each is hereto attached.

Witness my hand and the seal of the Circuit Court of the Fifth Circuit, Territory of Hawaii, at Lihue, County of Kauai, Territory of Hawaii, this 3rd day of July, 1947.

[Seal] /s/ JOHN ILALAOLE, JR.,
Deputy Clerk, Circuit Court, Fifth Circuit, Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original.

 /s/ SAMUEL H. KIMURA,
File Clerk, Circuit Court, Fifth Circuit, Territory of Hawaii. [88]

In the Circuit Court of the Fifth Judicial Circuit,
Territory of Hawaii

At Chambers—In Equity

Eq. No. 120

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), LO-
CAL 149 of the INTERNATIONAL LONG-
SHOREMEN'S AND WAREHOUSEMEN'S
UNION (CIO), Unit 1, Local 149 of the IN-
TERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), JO-
SEPH NUNES, DANIEL RAPOZO, FER-
NANDO FONTANILLA, THOMAS TAKE-
MOTO, SUNAO IWAMOTO, WILLIAM
PAIA, YOSHIKAZU MORIMOTO, BENJA-
MIN IIDA, GEORGE MASAKI, CHARLES
MORITA, RONALD TOYOFUKU, TAKU
AKAMA, JOHN DOE, MARY DOE, RICH-
ARD ROE, et al.,

Respondents.

PETITION FOR INJUNCTION ORDER
TO SHOW CAUSE

Vitousek, Pratt & Winn, 404 Alexander & Bald-
win Bldg., Honolulu, T. H., Attorneys for Peti-
tioner. [89]

To the Honorable Philipp Rice, Judge of the Above-Entitled Court, Presiding at Chambers in Equity:

Comes now, The Lihue Plantation Company, Limited, Petitioner herein, and respectfully alleges and shows as follows:

I.

That the Petitioner, The Lihue Plantation Company, Limited, is a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii with its main offices located in Honolulu, City and County of Honolulu, Territory of Hawaii; [90]

II.

That the Respondent, International Longshoremen's and Warehousemen's Union (CIO), is an unincorporated labor union association, whose regional offices in the Territory of Hawaii are located at Pier 11, Queen Street, City and County of Honolulu, Territory, and whose main offices are located in San Francisco, California;

III.

That the Respondent Local 149 of the International Longshoremen's and Warehousemen's Union, is a local union of the above-named Respondent International Longshoremen's and Warehousemen's Union, and is composed of units for each of the sugar plantations located in the Territory of Hawaii; that so far as the Petitioners has been able to

ascertain, the offices of said Local 149 are located at Pier 11, South Queen Street, City and County of Honolulu, Territory of Hawaii;

IV.

That the Respondent Unit 1, Local 149, International Longshoremen's and Warehousemen's Union, is an unincorporated association, and a unit of the Respondent Local 149 referred to in Paragraph III herein above; that said Unit is composed of certain employee members from among the employees of the Petitioner; and that the offices of said Unit are located at Kapaia, County of Kauai, Territory of Hawaii; [91]

V.

That upon information and belief of the Petitioner, the individual named Respondents, Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, and Sunao Iwamoto are President, First Vice-President, Second Vice-President, Recording Secretary, and Financial Secretary, respectively, of the Respondent Union Local 149, Unit 1; that Respondent William Paia is the Island President of said Respondent Union Local 149; that Yoshikazu Morimoto is Business Agent of said Respondent Union Local 149 for the Island of Kauai; that the individual named Respondents Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama are each members of the above Respondent Unit 1, Local 149; that each of the above-named individual Respondents are res-

idents of the Island of Kauai, Territory of Hawaii; that the individual unnamed Respondents are unknown and for that reason certain fictitious names are used; that said individual unnamed Respondents include members of the above-named Respondent Unit 1, Local 149, Respondent Local 149, and Respondent International Longshoremen's and Warehousemen's Union, their officers, agents and servants, and others acting in concert and participation with the Respondents;

VI.

That the Respondent International Longshoremen's and Warehousemen's Union, Local 149, did, on the first day of September, 1946, call out on strike the Petitioner's employees at the Petitioner's plantation located in the County of Kauai, Territory of Hawaii; that the Respondents, their agents, servants and employees, and others in active concert and participation with them have congregated and still continue to congregate in mobs and as picketers at times in excess of two hundred (200) persons, near or upon plantation property in the immediate vicinity of the entrances to the mill, store, and other premises of the Petitioner, in a disorderly and unlawful manner, and have wilfully and maliciously blocked and continue to block the entrances to the Petitioner's premises; that said Respondents, their agents, servants and employees and others in active concert and participation with them continue to congregate at all hours of the day and especially when Petitioner's supervisory per-

sonnel and other employees seek to enter upon the mill premises; that said Respondents, their agents, servants and employees and others in active concert and participation with them have indicated by their actions and otherwise their firm intention to deny and have denied to the Petitioner lawful entry upon its premises, and to deny entry to any other persons lawfully seeking to enter upon said premises, whether for the purposes of general maintenance and repair, proper protection and operation of utility equipment serving the community, preservation of foodstuffs, or operations directed to the care of growing crops and the undertaking of customary operations in connection therewith; that said mobs and picketers are at times boisterous, and use offensive, disorderly, abusive and insulting language, directing it at the employees of the Petitioner; that the Respondents, their agents, servants and employees, and others in active concert and participation with them, have threatened and still continue [93] to threaten Petitioner's employees with serious injury to their persons if they do not accede to Respondent's demands or if they attempt to proceed to work and to perform work; that said picketers and their activities as specified, have threatened to cause and have in fact caused numerous breaches of the peace; that the Respondents, their agents, servants and employees, and those in active concert and participation with them, unlawfully have picketed in numbers at times in excess of one hundred and fifty (150) persons, and are

continuing to picket many of the homes of the Petitioner's employees; that the said Respondents, their agents, servants, and employees and those in active concert and participation with them have congregated in front and around of the said homes and have used offensive, abusive, disorderly and insulting language and have caused disturbances by undue noise and unseemly acts so as to annoy, disturb, and be offensive to others; that said Respondents, their agents, servants, and employees and those others in active concert and participation with them have used threatening and intimidating language towards the Petitioner's employees concerning the safety of their families, and by their congregating have frightened and intimidated the members of the families of the Petitioner's employees; that the Respondents, their agents, servants and employees and those in active concert and participation with them unlawfully have picketed many roads and streets throughout plantation property, stopping and intimidating any and all persons seeking ingress on such roads and streets; [94]

VII.

That by reason of the conduct of the Respondents set forth in Paragraph VI, said Respondents have obstructed the means of ingress and egress used by Petitioner's employees to and from said mill, store and other plantation premises and have intimidated Petitioner's employees desiring to enter or proceed in and from said premises;

VIII.

That by reason of the conduct of the Respondents set forth in Paragraph VI above, and by false and misleading statements to the employees of Petitioner, the Respondents have wilfully, unlawfully and maliciously prevented a number of persons from continuing in the active employ of Petitioner and from entering said plant to work or to seek employment with the Petitioner;

IX.

That by reason of the conduct of the Respondents and their agents, servants and employees and others in concert and participation with them, as set forth in Paragraphs VI, VII, and VIII, Petitioner has been unable to repair or operate its mill, to irrigate its fields, properly maintain its utilities, protect its foodstuffs, or otherwise to perform even essential maintenance of equipment; that the unlawful acts set forth in this petition have been committed and that such acts will be continued, unless restrained; and that substantial and irreparable injury to the Petitioner's property will follow unless the requested relief is granted; [95]

X.

That, upon information and belief, the conduct of the Respondents, set forth in Paragraphs VI, VII, and VIII, above, will continue unless restrained;

XI.

That the Petitioner has no adequate remedy at law; Wherefore, Petitioner prays:

(1) That an order issue out of and under the seal of this Honorable Court as provided by law directed to the Respondents herein ordering them to appear ten days from the date of the filing of this petition and at a place to be designated by the Court and then and there to show cause, if any they have, why the injunction herein petitioned for should not be entered and issue; and

(2) That after a hearing hereon an order be entered herein restraining and enjoining the Respondents and each of them from in any way

(a) Interfering with the ingress and egress from the Petitioner's mill, store or other plantation buildings and premises located in the County of Kauai, Territory of Hawaii, by the Petitioner, its employees, or any others who may enter said premises for the purpose of performing work or for other lawful occasion;

(b) Threatening violence or using coercion or intimidation by force of numbers or otherwise, or other unlawful means upon the employees of the Petitioner or those seeking employment with the Petitioner, or others lawfully entering upon the Petitioner's premises or proceeding to or from said premises; [96]

(c) Coercing or intimidating employees of the Petitioner or those seeking employment with the Petitioner, by means of threats concerning the safety and welfare of any of the Petitioner's employees families or those seek-

ing employment with the Petitioner; or coercing or intimidating the families of the Petitioner's employees;

(d) Visiting the homes of the Petitioner's employees or persons seeking employment with the Petitioner or approaching, following or trailing any of said persons at any place whatsoever in an offensive, disorderly, threatening or intimidating manner, or in such a manner as to provoke a breach of the peace;

(e) Picketing the homes of the Petitioner's employees or persons seeking employment with the Petitioner;

(f) Making, uttering or circulating any false, deceitful or untrue statements with reference to the Petitioner, its employment practices, and its employees working therein, or others seeking to work therein;

(g) Mass picketing or other congregating in crowds on or near the premises of the Petitioner;

(3) That the Court fix the proper number of pickets and restrain the Respondents from picketing the Petitioner's mill, offices, stores or other buildings or premises with more than the number so fixed by the Court, such pickets to wear badges reading "Authorized Picket"; [97]

(4) That the Court grant such other and further relief as the Petitioner may be entitled to in equity.

Dated: Lihue, Kauai, T. H., 16th September, 1946.

/s/ C. E. S. BURNS.

Territory of Hawaii,
County of Kauai—ss.

C. E. S. Burns, being first duly sworn, on oath deposes and says, That he is Manager of The Lihue Plantation Company, Limited, the Petitioner named herein; that he has read the foregoing petition, knows the contents thereof and that the allegations contained herein are true and correct, except the allegations made on information and belief and as to those he believes them to be true.

/s/ C. E. S. BURNS.

Subscribed and sworn to before me this 16th day of September, 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My Commission Expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

/s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946.

PETITIONER'S EXHIBIT NO. 1

In the Circuit Court of the Fifth Judicial Circuit,
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, Ronald G. Watt, being first duly sworn do depose and say as follows:

That I am employed as factory superintendent of The Lihue Plantation Company, Limited, having been employed by said company since January 15, 1944.

That on September 14, 1946, I arrived at the Lihue Plantation factory about 5:15 a.m. and proceeded to drive into the south entrance as usual. I encountered a solid line of pickets approximately ten deep and estimated that there were approximately 75 to 100 men in that group. I had to apply my brakes rather suddenly to keep from running into them and my car was immediately surrounded and pushed backwards. The two men doing most of the talking and giving instructions to the pickets were Gregorio Reyes Navarro and George Masaki. Several of the pickets who surrounded the car started to pick the car up and bounce it around. It was immediately apparent to me that I was not going to be allowed to enter the mill and that I was in personal danger judging by the threatening attitude of the men.

Gregorio Reyes Navarro stood in front of the car with his hands on the radiator and told me that no one could come in the mill. George Masaki was at that time standing at the window of the car so I

asked him what was going on. Whether he then asked or some other person, I was not certain but I was asked where I was going. I stated I was going into the mill. There was then a lot of shouting and cat-calling while the mob pressed closer around the car. At this time they were [99] pushing the car from side to side and then some of them proceeded to lift up the car from the rear. I then put the car into reverse and succeeded in backing up into the government road as they opened up behind the car. I drove over towards the Lihue Garage, located next to the warehouse and met Mr. Keith Tester, Assistant Manager of the plantation. I then saw Mr. Buddingh, Chief Engineer, and Antone Camara, Shift Engineer, being jostled around, being shouldered and elbowed, preventing them from going through the picket line to enter the mill. This was at the warehouse entrance, and the mob here numbered about 50 to 75, and being reinforced constantly with additional numbers. There was much milling around. Mr. Tester and I then walked over towards Camara and Buddingh. Mr. Tester was more or less swallowed up by the crowd, then he returned with Camara and Buddingh. Then I suggested we call the police to try to open up the picket lines. Then Mr. Tester and I drove our respective cars to the main entrance, the south entrance. At that time I witnessed Mr. Cheatham, Electrical Superintendent, drive in towards the picket line at that entrance. The crowd then milled around his truck in a similar manner to that which happened to me. Mr. Tester asked for the picket captain, but nobody

spoke up. Ben Iida, one of the union members talked to Mr. Tester. This occurred amidst much booing and yelling. Mr. Tester then left to get the police. I then parked by the sugar room and talked to Cheatham, who had left his truck amidst the pickets. Mr. Tester returned and approximately ten minutes later, a police officer arrived and the situation explained to him. In about fifteen more minutes, Lieutenant J. S. Carvalho, of the police, arrived, and he in turn was asked by Mr. Tester and myself to take action in opening up the picket line. Then the Assistant Chief of Police, Fernandes, arrived in about twenty minutes. The shouting and milling around continued [100] throughout this entire time. At about this time working supervisors commenced to arrive and were immediately greeted with shouts and cat-calls. I explained the situation to them as they arrived. I advised them to stay in their cars and avoid trouble. The Assistant Chief of Police then called the Chief of Police and the Chief then spent most all of his time in a conference with the Union representatives. This continued for about an hour without any change in the situation. Mr. Burns, the Plantation Manager, arrived, driving his car through the mill premises from the north entrance with pickets hanging onto his car in an obvious effort to force him to stop, amidst much shouting and cat-calling. Mr. Burns then tried to talk to the Police Chief, but the Chief indicated that he was preoccupied with the Union leaders.

Mr. Burns finally instructed me to have my men return home, it being obvious that the mob was de-

terminated to deny all entrance to the mill. This was about 10:00 a.m. After making certain that all of my men were accounted for, I left the mill area.

Further affiant sayeth not.

/s/ RONALD G. WATT.

Subscribed and sworn to before me this 15th day of September, 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

/s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946.

PETITIONER'S EXHIBIT NO. 2

In the Circuit Court of the Fifth Judicial Circuit,
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, Keith B. Tester, being first duly sworn do depose and say as follows:

That I am employed as Assistant Manager, of The Lihue Plantation Company, Limited, having been employed by said company since January 1st, 1946.

That, I arrived at the Lihue Garage stand at 5:00 a.m. At that time the pickets were assembling. There were probably about 100 around the mill and vicinity. Between 5 o'clock and 5:30 it appeared to me that several hundred more arrived. Several truck loads from outside came and joined the mob. About 5:15 a hundred or so pickets lined up against the wall of the garage parallel to my car. Those in the garage were myself, Jim Langley, Hank Buddingh, Norbert Penna, Tony Camara and John Travasso, all employees of the company. About 5:20 I entered my car to go to Hanamaulu. Simultaneously Mr. R. G. Watt, Factory Superintendent, drove down toward the main entrance to the mill to his office. At this time there was a tremendous amount of shouting and booing and name calling and Mr. Buddingh called my attention to the fact that Mr. Watt's car had been stopped. I turned my car around and headed in the direction of Hanamaulu. At that time Hank Buddingh, Camara and Penna started to walk toward the mill in the direction of the sugar room. I stopped my car and witnessed violent shoving and pushing being received by these men. I got out and walked toward them. After they had been pushed around, they came over toward the road and while the pickets were following Mr. Buddingh and Camara toward the road, Penna managed to squeeze by and get into the mill. I then went over to the picket line in front of the main entrance to the mill and asked [102] for the picket captain. After some heckling Ben Iida

stepped forward. I asked them if they had received instructions from the Sheriff to open up a way in the picket lines for automobiles and pedestrians. He answered "No." I then asked if he intended to open up for the cars and those who wanted to work in the mill. He again stated "No." A few minutes after this, Mr. Cheatham came with his pickup truck to go to the mill power house. His car was also forcibly stopped and after some arguing Mr. Cheatham stepped out and joined the rest of us. After talking things over with Mr. Watt we decided it would be better to go up and see if we could contact the police. So I immediately left for the County Building and requested the police to come to the mill. I then returned to the mill site.

That, at about 5:35 a.m., one policeman arrived and, after being asked if he would open the picket line, stated he could take no action until given orders from his superiors. I then called for others from the police force to come down. In the meantime additional strike pickets arrived from Hanamaula bring the total number probably to around 600 to 700.

That, after Lt. Carvalho of the police force arrived we again requested the picket line to be opened up and suggested that several of us might attempt to go through on foot. He directed us not to take any such action but to stand fast until the assistant chief of police came. Similar requests were made to the assistant chief, Antone Fernandes, when he arrived—and he also ordered us to stand fast until he had determined what action should be taken.

That, in the meantime most of those who are turning out to work in the mill had arrived in their cars. No attempt was made to go through the picket lines at that time. Mr. Burns was then called and given a picture of conditions at the factory. Soon after this, he arrived on the scene. [103]

That Yoshikazu Morimoto, an employee on leave and Island business agent for the I.L.W.U., arrived at about this time. Chief Crowell immediately went over and talked with Morimoto and a group of union men. Mr. Burns, on several occasions went over to the chief and asked what he was going to do and his reply was to "wait." After waiting a while Mr. Burns and I went over to the edge of the group to which the chief was talking and Mr. Burns asked to have the road opened up. The chief said "wait." The group of union men objected to Mr. Burns and I being there while they were talking with the chief and Mr. Burns stated that we were on a public road and we would stay unless the chief requested that we leave. After several minutes the chief, in answer to a direct question by the union spokesman, to him, as to whether he would request us to leave, turned to Mr. Burns and said we had better leave.

At little later, at 7:55 a.m., Mr. Burns and myself again went to the chief who was still in discussion with the union members, and requested that the

roads be opened for employees and the public. The chief of police asked that we wait until he got through with "these boys." Mr. Burns said "I am asking again to have these roads opened up." The chief then answered "wait." We walked off. Some time later the chief came over to Mr. Burns, who called myself and Rockwell Smith over to listen in, and the chief stated that in his discussion with the union men, they were willing to let Messrs. Burns, Tester, Watt and perhaps Mr. Smith through the picket line, but no others. Mr. Burns said I am asking to have this road opened up for all of our employees. In the discussion the police chief stated that the pickets would not allow the others to go through and that there would be bloodshed if they attempted. Mr. Burns stated that he did not want violence, but thought that the police department should see to getting the road opened up for all, and he would think that if they had stated that there would be bloodshed the police department should call in the police from other districts and keep the situation under control and see that there was no violence, and that the [104] roads were opened up. The chief then walked off, and Mr. Burns instructed those of us who could be spared to go off to breakfast.

That from the above it was clear that the pickets had barred all entrances to the mill and it was their firm intention which they proceeded to carry out, that only specified personnel were to be permitted

to enter the mill premises. All of the above took place on Saturday morning, September 14, 1946.

Further affiant sayeth not.

/s/ KEITH B. TESTER.

Subscribed and sworn to before me, this 15th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

/s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [105]

PETITIONER'S EXHIBIT NO. 3

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, Antone Camara, being first duly sworn do depose and say as follows:

That I am employed as shift engineer at the mill, of The Lihue Plantation Company, Limited, having been employed by said company since 1933.

That, I was on duty at the mill on the night of September 13th to 14th, 1946, on guard shift. Mr. Buddingh, chief engineer and my boss, came to the mill at about 4:00 a.m. Then Mr. Buddingh and I went to the garage and talked with Mr. Tester and Johnny Travasso. While at the garage the men started to come in mill premises about 4:45 a.m., or 5 a.m., I am not sure about the exact time. Mr. Buddingh and I intended to go back to the mill and they then stopped us by forming a group of about one hundred men in front of us, preventing us from going in. Some of the men were plantation workers on strike, while others were unknown to me. We tried to go through the line but we were blocked with force—they shoved us around and pushed back. They closed their fists, and then Mr. Buddingh and I backed out and went to join Mr. Tester who was standing nearby. They yelled out asking if we knew what was the meaning of scab—they then said if we don't know the meaning of scab—it meant "A scab is a two-legged dog." Some of them would ask the questions and then others of them would give the answers. As we were standing on the road, Mr. Cheatham came down and tried to go through into the mill and they stopped him. These men were very noisy and rough, booing and calling names. They also yelled at me and said, "Tony, you don't join the union because you think that will make Mr. Burns give you a fat raise." [106]

That, there was present in the mill premises when the above occurred, George Masaki, picket chairman of the union, and later Morimoto, business agent of the union, who were present for some considerable time during which the picketing continued with all the shouting.

That, I witnessed the pickets crowd around and force Mr. Cheathan to stop his truck so he could not drive it in the mill.

Further affiant sayeth not.

/s/ MR. ANTONE CAMARA.

Subscribed and sworn to before me, this 15th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

/s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [107]

PETITIONER'S EXHIBIT NO. 4

In the Circuit Court of the Fifth Judicial Circuit,
Territory of Hawaii

County of Kauai,

Territory of Hawaii—ss.

I, Hale C. Cheatheam, having been first duly sworn, do depose and say as follows:

That I am employed as chief electrician of The Lihue Plantation Company, Limited, having been employed by said company since 1927.

I got a phone call from Norbert Penna, acting watchman at the mill, approximately at 5:00 a.m. this morning (September 14, 1946), stating that there was trouble at the mill and that Mr. Buddingh and Mr. Watt were surrounded by pickets. I looked out of my window and noticed that the street lights were off; the street lights were off earlier than usual. So I thought I had better go down to the mill to see why they were off—and also to see if the trouble was in my department. I went down to the mill in my plantation work truck and arrived at the mill at approximately 5:15 a.m. As I turned the corner to enter the private road which is the front entrance to the mill, the road was blocked by approximately one hundred or more of what I assumed to be pickets. They were across the road in a body or group of about fifteen men deep. So I slowed down and tried to go through the group of men and the crowd parted and I was able

to get about half the way through this group of pickets. I was going very slowly and was almost at a standstill. At that time the men were in front and on both sides of the car and grabbed the car and I was unable to proceed any further. One of the boys, M. Sano, who works for me, as an [108] electrician, came through the crowd to the door of the truck and informed me that no one was to get in the mill or out of the mill today. I explained to him that I was on a trouble call and would like to get through to the mill and he again replied that "nobody gets through into or out of the mill today and that we mean it." So I explained to him again that I was on a trouble call and wanted to get into the mill and would leave as soon as I could, and again his reply was "Nobody gets into the mill or out of the mill and we mean it." So I said "O.K. I will leave." While starting up my truck, the gang still surrounding it, my foot slipped off the brake and the car jerked ahead about six inches. At this time all persons were clear of the car by several feet. One of the boys, Ben Iida by name, came walking around to the driver's side of the car, drawing up the pants legs of his trousers and claimed I hit him and invited me out to fight. I ignored him and M. Sano started talking to me again. The rest of the men quieted Ben Iida down. While talking to M. Sano, several of the boys opened the door of the car on the driver's side and removed the key to the truck. After listening to M. Sano again, he told me that "Nobody would enter

or leave the mill today.” The boy who took the key out of the car gave the key back to me. All this time I was in the driver’s seat of the truck and had not gotten out of the truck.

At this time, the assistant manager, Mr. Tester, and the mill superintendent, Mr. Watt, who had started walking down the road from the warehouse at the beginning of this incident, reached the side of the car and asked me to leave the car there and come back with them. I left the car and followed them back to the edge of the Government highway.

From the time I arrived at the mill road entrance at about 5:15 a.m., until I left at approximately 8:30 a.m., the pickets were formed in a line about eight to fifteen men deep and barred the entrance to the mill; other than Mr. Penna, to my knowledge no person was able to cross the picket lines and enter the mill.

On September 14, 1946, at 3:30 p.m., I attempted to enter the mill to make a check of my department to ascertain whether the peak electrical load required at night could be taken care of. I drove to the mill in my truck. As I left the Government road, there was a road block on the plantation road made up of railroad ties, rocks, picket signs and boxes which made it impossible to proceed. Back of this road block was an automobile and alongside were two pickets who shouted “stop” as I approached.

I stopped the car and the pickets continued to yell and shout; in about two minutes a total of nine

pickets assembled at the road block. I backed my car away. I drove toward the warehouse and found another road block made up of stones, railroad ties, boxes, picket signs, which completely obstructed the road. I drove to the back entrance of the mill and found wire across the road which blocked my entrance—two pickets were stationed there.

All road blocks and pickets at the road blocks were on plantation property and it was impossible for me to enter the mill.

Further affiant sayeth not.

/s/ HALE C. CHEATHAM,

Subscribed and sworn to before me, this 15th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

/s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [110]

PETITIONER'S EXHIBIT NO. 5

In the Circuit Court of the Fifth Judicial Circuit,
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, Wm. A. H. Buddingh, being first duly sworn
do depose and say as follows:

That I am employed as chief engineer of The
Lihue Plantation Company, Limited, having been
employed by said company since April 1, 1945.

That I arrived at the mill at 4:00 a.m., and found
everything peaceful. A few pickets were at the
south entrance as I came in and I found the two
watchmen, Penna and Camara, in good spirits, re-
porting no incidents during the night. As a matter
of fact, they made the statement that there were
very few pickets on duty that night. About 4:30
or 4:45 a.m., the three of us went to the garage and
met John Travasso, the camp policeman. After
talking with him for a while I made the statement
that one truck had already arrived with one load
of pickets, presumably from Grove Farm or
Koloa—but I don't know for sure. There were no
actions of violence up to that time. After a few
minutes Jim Langley, section overseer, and Keith
Tester, assistant manager, arrived and we were dis-
cussing the general situation of mass picketing.
During this period pickets were assembling in great
numbers, I would guess between one hundred to one
hundred fifty men were at the garage west of the
company warehouse, which is located on company

property. All of a sudden a group of pickets proceeded to form a line, shoulder to shoulder, starting from the garage south toward the warehouse and fire station. At that time I suggested to Tony Camara, "let us proceed to go into the factory to see if any other pickets had assembled at the other entrances." When we started towards the [111] mill the pickets, in mass, formed a line about 5 to 7 men deep, shoulder to shoulder, and barred our way. On our second attempt to go through, we were stopped and pushed from about the middle of the parking lot to the oil drums in front of the warehouse. Following the second attempt Keith Tester told us to lay off and refrain from any further attempts until the proper authorities were notified. Tom Watt, mill superintendent, arrived at about the time of these proceedings—definite time I would not be able to vouch for. During this incident much cat-calling and booing occurred and questions and answers given by the mob of pickets such as:

What is a scab?

Down with the scabs.

A scab is a dog on two legs.

And various booings and what-not.

That during the attempt to stop Tony Camara and myself, Penna managed to out-flank the picket line and get in back of them. After which I gave him the high sign not to wait for us but to proceed into the factory where he remained until I left the mill site around 8:30 a.m. After the police arrived on the scene I had no active part in any of the proceedings.

That Jose Bernal from Hanamaulu shouted after Mr. Burns had arrived at the scene “you won’t be manager any longer because we don’t want to work for you.”

That Yoichi Watada, carpenter shop foreman, was also barred by the pickets from entering the mill area where his shops and office are located. The pickets shouted at Watada and said that if he had joined the union when they had tried to force him to, he would now be on their side and not with a group of scabs and haoles.

That I heard another picket say in effect: “Down with Buddingh as chief engineer—send him back to McBryde—we will make Bill Paia our chief engineer. [112]

Further affiant sayeth not.

/s/ WM. A. H. BUDDINGH.

Subscribed and sworn to before me, this 15th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

/s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [113]

PETITIONER'S EXHIBIT NO. 6

In the Circuit Court of the Fifth Judicial Circuit,
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, Norbert Penna, having been first duly sworn,
do depose and say as follows:

That I am employed as fireroom foreman of The Lihue Plantation Company, Limited, having been employed by said company for 18 years.

I reported for work at the mill as acting watchman at 6:00 p.m., on September 13, 1946, and at about 5:00 a.m., on September 14, 1946, Mr. Buddingh, Tony Camara and myself were sitting down by the truck house that is close to the warehouse—union members started gathering around the truck house, and then Mr. Tester came along and we stayed there and had a little talk. Mr. Tester got up and went to his car. So the three of us, Buddingh, Tony Camara and myself, stood up and we were going to make another tour around the mill. Then about fifty pickets surrounded Mr. Tester's car and said "Hold that car." Then they stopped and they started gathering around us. Tester got off his car and walked to a man and said "You want to stop my car?" And he said, "No." So Tester got in his car and turned his car around. Then we three started to walk toward the mill; at this time the pickets pushed and strong armed us back—then the mob of about fifty pickets gathered around Mr. Buddingh and Tony Camara, so that it was im-

possible for Mr. Buddingh and Tony to move. At this time two men were in front of me. I moved around them and entered the mill. [114]

From the mill I noticed that Mr. Watt was coming down in his car and they surrounded Mr. Watt. By that time the mob grew bigger and they formed a thick blockade to the mill entrance so that not even a child could go through. The mob turned around and saw me—and they said, “There is one of the dirty dogs—you a scab, you won’t be able to come out of that mill—we will let you starve and rot in that mill—have you got any food there?” Then by that time the police arrived. From where I was standing in the mill, it seems they were talking to Mr. Watt, Buddingh and Tony Camara. And it was then I saw Mr. Burns try to go through the line with his car from the mill to the main highway and they started to call him “scab.” He tooted his horn. I saw some policeman walk toward Mr. Burn’s car. The crowd very slowly opened up and a very little hole was made for his car to move out from the private road toward the main highway. From the place where I was I could see Mr. Burns get out of his car. When he did that this gang all started booing and calling him “scab.” He talked with the Supervisors and to Mr. Watt—then he walked to the policemen, then back to Mr. Watt, and the Supervisors—but the policemen seemed to be doing nothing. The crowd all started booing and calling “scabs”—then from where I was I waited to see what would become of it. They continuously looked to my side and repeated, “Scab—you dirty

dog—Come in now and join us and you will be better off—All your bosses cannot do anything for you.” I waited and finally from the main highway Mr. Watt signalled me to come out to the main highway. Then all the supervisors were told to go home. I went home at about 9:30 a.m., and I don’t know what happened after that. [115]

There were between three hundred and four hundred pickets on the plantation property and they were so close in line that no one could have gotten through.

Further, affiant sayeth not.

/s/ NORBERT PENNA.

Subscribed and sworn to before me this 15th day of September, 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory
of Hawaii.

My Commission Expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [116]

PETITIONER'S EXHIBIT No. 7

In the Circuit Court of the Fifth Judicial Circuit,
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, Courtland E. Ashton, being first duly sworn do
depose and say as follows:

That I am employed as Head Sugar Boiler, of
The Lihue Plantation Company, Limited, having
been employed by said company since March, 1945.

That when I arrived at the mill about 6:15 a.m.,
September 14, 1946, I found many company cars
jammed into the road that enters the mill—among
them was Hale Cheatham's car, the head electrician,
and the carpenters car which was driven by Mr.
Prueser, the head blacksmith—so I stopped my car
and got out and the gang on the road yelled: "We
want Ashton, We want Ashton," stating this in a
defiant manner amounting to a dare. I asked Tom
Watt if I could go through and he said, "Better
wait awhile." Then I went over and saw the two
policemen who were standing there and asked them
if this wasn't a private roadway and asked them
why I should not be admitted—and they said they
would have to wait for the Chief. In my opinion
there were from the entrance to the warehouse down
to the road to the mill proper about two hundred
and fifty pickets or men scattered around strung
out and moving back and forth. I found them to
be extremely noisy and unruly, booing everybody,

calling them by name. Some of them yelled out to Mr. Burns stating that "You will not be manager next year—as nobody will work for you."

That it was clear to me that anyone attempting to enter the mill would be stopped immediately.

That, about 5:00 p.m., the same day I drove by the mill yard and saw blockades had been erected by the men, which consisted of skips piled up and boxes, and in some cases wires were stretched across, all at the warehouse entrance. At the main entrance and in the mill yard there was a car parked directly across the road preventing access to the mill. I could see men around at various places.

Further affiant sayeth not.

/s/ COURTLAND E. ASHTON.

Subscribed and sworn to before me, this 15th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

/s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [118]

PETITIONER'S EXHIBIT No. 8

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, Leonard T. Cannon, having been first duly sworn, do depose and say as follows:

That I am employed as Assistant Manager of Lihue Store, having been employed by said company since May 1934.

That picketing started at the store on September 3rd, 1946, with approximately seventy-five pickets surrounding the doorways at 7:30 a.m. They made no attempt to stop the department heads or myself from entering the building. The same condition prevailed until Saturday, September 7th, 1946, when at 11:30 a.m., Ben Iida, Jr., an employee on strike, active in Union strike strategy, stopped me on the street and stated that under no circumstances would anyone be allowed through our front door on Monday morning, September 9th, 1946, as they were going to throw up a solid wall of pickets, shoulder to shoulder, and that if I wanted to go through I would have to get a policeman to order them to make a passageway. I sent the department heads home at noon on that day, and the pickets left the store at about 2:30 p.m., leaving a few so-called union police on the front veranda and at the driveways. Mr. Burns instructed me to attempt to go through the

front door as usual. As all of our department heads had been entering the store from the back, I instructed them to follow their usual procedure on Monday morning. On Sunday evening, September 8th, 1946, I had several callers, consisting of store department heads, who were quite alarmed at the threats made directly to them by the union members, as to what would happen to them if they did not join the union. These threats consisted [119] of misrepresentation concerning their not having any job when the strike was over, as well as threats of mass picketing of their homes. I telephoned Mr. Burns and gave him a statement regarding the conversations. Later in the evening, Mr. Burns stopped at my home and suggested that in view of the union's determination on the blockading of the store that I should use the rear, private entrance until further notice. When I arrived at work on Monday, September 9, 1946, there were approximately one hundred pickets on the front veranda standing shoulder to shoulder. In view of the warnings given me by the union representatives and the attitude of the pickets, I proceeded through the back entrance. Sandy Hutton, Store Department Head, was refused admission at the entrance opposite the Bank of Hawaii. Sakai Muroka, Grocery Department Manager, called me from the Tip Top Cafe stating that both he and Hutton had been refused entrance at the road next to the Von Hamm Young Co., Ltd. At 9:30 a.m., E. K. Fujimoto, Temporary Manager, Meat Department, called on me, person-

ally stating that he was going out on strike. Kay Arita, Supervisor in charge of the vegetable department, resigned from the company. Sandy Hutton called and informed me that he had been refused admittance. I asked him to attempt once more to go through the line. He was stopped again. I sent him home for the balance of the day. On Tuesday, September 10, 1946, there were very few pickets in front of the store. Most of them were grouped in the doorways. This condition prevailed until Saturday, September 14, 1946. Raymond Souza, Branch Manager of the Kealia Store, resigned and turned his keys in on September 3, 1946. He made no attempt whatever to enter the store at Kealia. Sakai Kawamura, Lumberyard Foreman, resigned and turned his keys in on September 8, 1946. Joe Rapozo, Supervisor in charge of household appliances, has had the union call on him numerous times and is still fighting them off. Harry Yamaguchi, Acting Manager of Kealia Store, has had a great deal of trouble with mass picketing at his home, with threats consisting of people not trading at the store afterwards and being ostracized by camp people unless he joins. [120]

From the manner in which the picketing has been conducted at the store throughout the entire period since the strike commenced, it is my opinion that the striking employees under the direction of the union will continue to deny access to the store by myself, any other representatives of management, or any other persons from entering the store in the normal manner.

It is also my opinion that the conduct of the striking employees and the union were the direct cause of the resignation of supervisory personnel as set forth above.

Further affiant sayeth not.

/s/ L. T. CANNON.

Subscribed and sworn to before me, this 16th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [121]

PETITIONER'S EXHIBIT No. 9

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, Alexander G. Hutton, being first duly sworn do depose and say as follows:

That I am employed as Department Manager of the Dry Goods, Shoes and Drug Departments of the Lihue Store, having been employed by said company about 20 years.

That at about 7:20 a.m. on September 16, 1946, I reported for work as usual. I drove my car into the entrance of the Lihue Store, that is, the one next to the office. As I entered this private driveway, I was stopped by about ten pickets who said that I could not go in to work. Another group of pickets were in front of my car and further down the driveway, and when I was stopped they waved their hands and arms and indicated I was to get off of the property. I then backed my car to the government road and reported to the main plantation office.

I believe that if I had attempted to force my way through the pickets that violence would have resulted.

Further affiant sayeth not.

/s/ ALEXANDER G. HUTTON.

Subscribed and sworn to before me, this 16th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [122]

PETITIONER'S EXHIBIT No. 10

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,

Territory of Hawaii—ss.

I, Harry Nogami, being first duly sworn do depose and say as follows:

That I am employed as Maintenance Foreman at the Lihue Plantation Store, of the Lihue Plantation Company, Limited, having been employed by said Company approximately seven or eight years.

That, as maintenance foreman it is my duty to do minor repair work and find out if chill rooms and freezers are working. I am also in charge of the store janitors, and night watchmen.

At the Lihue Store there are the following cold storage compartments: three freeze rooms, four chill rooms. The store also operates and controls what is known as the Army cold storage warehouse, located in Lihue, which has been taken over by the Lihue Store. This building has two large chill rooms and one large freeze room. In all of the above rooms we store and keep from spoiling large amounts of butter, poultry, beef, lamb and all types of other meats and dairy products.

At the Army warehouse it is my duty to defrost rooms and keep them at a required low temperature. I defrost the ice on the coils every day so that the food will not spoil. [123]

On September 16, 1946, at about 7:15 a.m. I reported for work and drove my truck into the Von Hamm Young entrance, which leads to the back of the store. As I entered this private road I was

stopped by about thirty to forty pickets. They said to me, "Go back home, we do not allow scabs to work." They told me to go home. I did not argue with them. After this I backed my truck to the main road and went home.

Again on September 16, 1946, at about 9:00 a.m. I again attempted to go to work. I drove my truck to the Bank of Hawaii entrance, which is a private road, and was again stopped by pickets who said, I could not go through. Other pickets were about car /s/ H. C. W.

fifty feet in front of the ~~store~~. Knowing that I could not get in the store, I backed out and reported to Mr. Cannon, who is Assistance Manager of Lihue Store.

I know food will spoil if rooms are not defrosted. Further affiant sayeth not.

/s/ HARRY NOGAMI.

Line 10 Page 2 Corrected "car" corrected prior to acknowledgment.

/s/ H. C. W.

Subscribed and sworn to before me, this 16th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [124]

PETITIONER'S EXHIBIT No. 11

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,

Territory of Hawaii—ss.

I, Courtland E. Ashton, being first duly sworn do depose and say as follows:

That I am employed as Head Sugar Boiler, of the Lihue Plantation Company, Limited, having been employed by said company since March 1, 1945.

That, at about 11:00 a.m. on September 16, 1946, I drove to the Lihue Mill to inspect my department and to shut off the crystallizers.

I drove to the main mill yard entrance and found the private roadway leading to the mill yard blocked by about fifteen pickets. As I approached, the pickets formed a line, shoulder to shoulder across the road and barred my way. I was stopped and could not enter the mill. I asked Karemoto, one of the pickets, if I could enter the mill. He stated that I could not go through.

I backed away and proceeded to drive to the warehouse entrance to the mill yard and was again stopped by about ten pickets who formed a line across the road entrance.

I next drove to the side entrance to the mill yard and as I approached found a wire strung across the roadway with benches placed under the wire which formed a road block. The same Karemoto referred to above had rushed from the main entrance [125] to the side entrance and assisted the other pickets

in blocking the road so that I could not enter the mill yard or proceed to the mill.

Further affiant sayeth not.

/s/ COURTLAND E. ASHTON.

Subscribed and sworn to before me, this 16th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [126]

PETITIONER'S EXHIBIT No. 12

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, William A. H. Buddingh, being first duly sworn do depose and say as follows:

That I am employed as Chief Engineer of The Lihue Plantation Company, Limited, having been employed by said company since April 1, 1945.

That on September 16, 1946 at about 11:00 a.m., I drove my car to the south gate of the Lihue Mill with the intention of entering the mill to perform my duties required by my job. I left the government road and entered the mill premises and was

stopped by a solid line of between fifteen to twenty pickets. This line of pickets extended across the road way and they prevented me from entering the mill.

I then proceeded to what is known as the warehouse or back entrance to the mill and found upon my arrival that this entrance to the mill yard was also blocked by approximately ten pickets. They refused to allow me to enter.

I then drove to the north entrance to the mill yard and there also was stopped by a road block made up of wire strung across the roadway with wooden benches placed under the wire and was told by about ten pickets that I could not enter the mill.

I firmly believe that if I had attempted to cross the picket lines [127] that violence would have occurred.

Further affiant sayeth not.

/s/ WM. A. H. BUDDINGH.

Subscribed and sworn to before me, this 16th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [128]

PETITIONER'S EXHIBIT No. 13

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, Ronald G. Watt, being first duly sworn do depose and say as follows:

That I am employed as Factory Superintendent, of The Lihue Plantation Company Limited, having been employed by said company since January 15, 1944.

That, on September 16, 1946 at 11:00 a.m., I followed Mr. Wm. A. H. Buddingh and Mr. Courtland E. Ashton to the main (south) entrance to the Lihue Mill.

Both Mr. Buddingh and Mr. Ashton who were driving separate cars directly in front of me, were stopped as they entered the private roadway to the mill by a line of about twenty pickets who barred entrance to the mill yard. A person by the name of Karimoto, a sugar loader at the mill, was heading up the picket line.

When it was apparent we could not enter, Buddingh, Ashton and myself drove our separate cars to the warehouse entrance of the mill yard where we were again stopped by a line of pickets of about ten in number. After being refused entrance to the mill yard by the pickets, I returned to the main plantation office.

To maintain my responsibilities and duties as Factory Superintendent it is imperative that I have access to the factory at all times.

At this time and since the morning of September 14, 1946 there have been no authorized persons on duty in the factory. There is at all times a [129] potential fire hazard because of bagasse storage in the fireroom. This material is subject to self ignition through spontaneous combustion.

There is considerable low grade massecuite stored in the crystallizers which are located in the mill and it is essential that this equipment be in operation as continuously as the electric power system allows, that is, they must be in operation during the off peak hours.

Due to the mass picketing of the mill yard it is impossible for supervisory employees to enter the mill and perform their essential duties.

Further affiant sayeth not.

/s/ RONALD G. WATT.

Subscribed and sworn to before me, this 16th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [130]

PETITIONER'S EXHIBIT No. 14

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,

Territory of Hawaii—ss.

I, John S. Carvalho, being first duly sworn do
depose and say as follows:

That I am employed as Assistant Shop Superin-
tendent, of The Lihue Plantation Company, Lim-
ited, having been employed by said company since

4 /s/ H. C. W.
192~~3~~.

That on Monday, September 9th, 1946, at about
ten minutes to six o'clock, a.m., I came out of my
house which is a plantation house located at the
Hanamaulu Shop Camp, and there was a gang of
about 50 to 60 men outside. In my yard, facing
me, was a sign "Down With Traitors." I passed
the sign, went up to the leading man which was
Daniel Ferriera, an employee of the company, and
asked him if he was an American. He said he was
trying to be one. I told him that I am an American
and I made two steps forward toward the shop, and
then turned back to him and told him that I have
a baby five months old and it was sleeping right
now, and that I did not like to have any noise made,
and in return he told me that they would not bother
the baby; then I started for the shop—he ordered
his men to follow me. I walked about 25 feet and
he threatened me with these words that "I dared
to do any work in the shop," then I went into the
shop they all followed and he was right in back of

me and as I got into the office door he called me "scab." They stood there at the shop for about 20 minutes making a racket, then he turned around and ordered his men to my house. He also ordered a few boys to go and get guitars and a banjo and they played music and made a lot of noise purposely to bother the baby after I had asked him not to interfere with the baby, and he promised me that he would not. [131]

That while I was in the shop I began to worry about the baby so I called the police. In about eight minutes they were up at the house and the racket was still going on, they were there and they did not stop the racket. Mr. Burns called at the shop and Antone told Mr. Burns about the racket. In about ten minutes Mr. Burns was there to hear the racket. Then Antone called Father Maurice and told him what was going on at my place and he came up to the house, spoke to the boys for about five minutes and turned and came to the shop and spoke to me and Antone and he asked us a few questions. That is, if we were doing any work that is belonging to another man. I replied that the only work I was doing was that belonging to management. He left us and went back to the crowd and asked them if they were Americans—the way they were doing things was not democracy. After he spoke to them (the gang) to leave the place and stop making the noise because of the baby, they all left the place, but before they left my place they told the wife that they were coming back.

That the only reason I know that I was picked on was because I showed the truck operator how to use

the hose nozzle and faucet on the kerosene tank mounted on the truck. The kerosene to be delivered to the employees for fuel.

That the above is my statement of what happened at my place on September 9th, 1946.

That on Wednesday morning, September 11th, 1946, at about 6:30 a.m. to 7:00 a.m., a gang again picketed me at the Blacksmith Shop where I had gone to work. This gang was about thirty men. This gang stayed around about four hours then left.

That on Friday, September 13th, 1946, at about 8:00 a.m., some picketers, about fifteen in number, again appeared at the Blacksmith Shop, and were still there when I left about 8:30 a.m. When I came back to the shop at 2:00 p.m., [132] they were still there, and also when I left about 2:30 p.m.

Further affiant sayeth not.

/s/ JOHN S. CARVALHO.

Line 8 Page 1 Shld be "1924" Changed prior to acknowledgment.

/s/ H. C. W.

Subscribed and sworn to before me, this 16th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1948.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [133]

PETITIONER'S EXHIBIT No. 15

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, Mary Soares, having first been duly sworn, do depose and say as follows:

That I am the wife of Antone Soares, regular Welder's foreman, at The Lihue Plantation Company mill. My husband has been an employee of the Company since 1931.

That about 8:00 a.m. on Thursday, September 12, 1946, while my husband was at work and I was at home with my two children, aged five years, and one year, about twenty to twenty-five men came to the front of the house and gradually came around to the back, on the back road. Our house is a plantation house located in the new camp in Lihue. All roads around the house are plantation roads.

That these men shouted "Is this the scab's house?" and others would answer "Yes, this is the scab's house; a scab lives here." Then I came out and they said "This is Mrs. Scab." When I emptied the waste basket in the barrel alongside the road, one of the men came up to me and said "To think you live in a scab's house; if I were you I would run away." Another said, "I would kill myself." My little girl was playing in the yard and the men kept calling to her, "Your daddy is a scab." Then

one of the men came up on the road in front and shouted, "Yes, call him a scab," and then used profane words. I know this man by his appearance and his name is George Masaki, an employee of the company.

That about 9:00 a.m. to 9:30 a.m. my husband came home because, as he told me, he was worried about what was happening.

That about the same number of men stayed around all day. My little girl was quite shaken up by the noise and the yelling.

Further affiant sayeth not.

/s/ MARY SOARES.

Subscribed and sworn to before me this 15th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [135]

PETITIONER'S EXHIBIT No. 16

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,

Territory of Hawaii—ss.

I, Georgina Rosa, having been first duly sworn,
do depose and say as follows:

That I am the wife of John F. Rosa, Mill Engineer at The Lihue Plantation Company, Limited, having worked for the company for over fifteen years.

That on Wednesday, September 11, 1946, at about 3:00 p.m., while my husband was at work and I was at home with my youngest child, aged two years, and my aunt who is visiting me, about one hundred and fifty men congregated around the front and back of my home, milling around and shouting. They would shout, "Why do you live in the same house with a scab?" "Have you no shame?" They told me "Stay in the house and don't come outside, you scab."

That their manner, shouting and their numbers, frightened me and my aunt and my child was also very frightened and afraid to go into the yard.

That every time I came out on the porch, some of the men would proceed to relieve themselves deliberately so that I might see them, while others would shout and point to the men relieving themselves.

I turned up the radio full blast so we would not be able to hear them, but even this did not drown out their shouting.

When my children came back from school, one boy, aged seven, and two girls, aged twelve and fifteen, the men would not move and my children had difficulty to open the gate to get in the yard. They were called scabs by the mob. They told my boy to tell my husband he was a scab.

About 3:30 p.m. one of the men threw a paper into our yard and I called the police and one policeman came down and picked up the paper, talked to the men—but I did not hear what he said. He did not disperse the strikers picketing our house. After he left the strikers shouted louder at me and using profane language.

Soon after this my husband came home. The men stayed around until about 4:00 p.m. They threatened to come back when they left.

Further affiant sayeth not.

/s/ GEORGINA ROSA.

Subscribed and sworn to before me this 15th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My Commission Expires, June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above-entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Judicial Circuit, Terri-
tory of Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [137]

PETITIONER'S EXHIBIT No. 17

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

We, Mr. and Mrs. Antone Camara, husband and wife, being first duly sworn, do depose and say as follows:

That the undersigned is employed as mill shift engineer, of The Lihue Plantation Company, Limited, having been employed by said company since 1933.

That the undersigned, Mrs. Antone Camara, is the wife of Antone Camara, an employee of The Lihue Plantation Company, Limited.

That we live in a plantation owned house located in Lihue on the main highway near the Lihue Theatre. We have two children $2\frac{1}{2}$ and 7 years of age.

That our house was picketed on September 10th and 11th, 1946, from 7:30 a.m., until about 4 p.m., each day. There were about 80 men in front of our house on the sidewalk, on our stone wall, and about 30 men on plantation road which is about 30 feet from the back of our house.

That I, Mrs. Camara, in doing my housework went in and out of the house, the pickets shouted each time "look at the scab's wife," "don't your conscience bother you?", and made other cat-calls.

That I, Mr. Camara, went to work at 6:00 p.m., and returned at about 6 a.m. and saw the pickets

as described above. Pickets called out to me and one said “come on you scab, why don’t you join us. Do you think by not joining us Mr. Burns will give you a fat raise?” Also, “don’t forget Tony, when this is over you will be thrown out.” And “don’t you know you are taking the work of us men here.”

That they also put a sign on my front gate which read “Occupant of This House is a Scab—Down With Scabs.”

Further affiants sayeth not.

/s/ MR. ANTONE CAMARA,

/s/ MRS. ANTONE CAMARA,

Subscribed and sworn to before me, this 15th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My Commission Expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above-entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Judicial Circuit, Terri-
tory of Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [139]

PETITIONER'S EXHIBIT No. 18

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, Charles J. Fern, being first duly sworn, do
depose and say as follows:

That I am a resident of the County of Kauai,
Territory of Hawaii,

That on Saturday, September 14, 1946, at about
8:00 a.m., I went down to The Lihue Plantation
Company mill and there witnessed the large num-
bers of persons congregated at the mill entrances.
I estimated there were over two hundred persons,
milling around in the main driveway and surround-
ing Hale Cheatham's pickup truck, Hale Cheatham
being known to me as the Electrical Superintendent
of The Lihue Plantation Company, Limited, that
there was also a large group of strikers on the
bank at the edge of the driveway;

I saw the Chief of Police conferring with a group
composed of Yoshikazu Morimoto, Taku Akama,
William Paia, George Masaki, Jerry Matsuyama,
all known to me personally as active union members
of The International Longshoremen's and Ware-
housemen's Union, and there were other persons
present unknown to me.

The Chief of Police was explaining to the union
representatives mentioned above, that the strikers
and the union men by keeping people from going

in and out of the mill were doing what they had been told not to do at some previous time in a conference with the County Attorney. He, the Chief of Police, asked them to break it up and clear the road. [140]

Yoshikazu Morimoto stated that he would first have to make a phone call. The Chief of Police indicated to me that Morimoto was referring to a phone call to Honolulu.

The milling around and booing continued. Morimoto returned after approximately fifteen to twenty minutes and again conferred with the union group. They then began mobilizing the picketers, assigning so-called union police and lining up the strikers, to get them into a compact mass across the mill driveways.

At this time, Mr. Caleb Burns, The Lihue Plantation Co., Ltd., Manager, informed the Chief of Police, in my presence, that he was sending his supervisory employees home to avoid any trouble, and that when the police were ready to open it up, then he, Mr. Burns, would send his men back.

While the supervisors left, amidst much shouting and booing.

I saw Yoshikazu Morimoto, and asked him—"Is this the result of your Honolulu phone call? Your instructions are to hold the line?" Morimoto replied "Yes, we are going to hold the line."

Soon thereafter, I left to telephone. At that time the massing of the men was still continuing.

Further affiant sayeth not.

/s/ CHARLES J. FERN.

Subscribed and sworn to before me, this 16th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My Commission Expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above-entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Judicial Circuit, Terri-
tory of Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [141]

PETITIONER'S EXHIBIT No. 19

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, C. E. S. Burns, having been first duly sworn,
do depose and say as follows:

That I am employed as General Manger of The Lihue Plantation Company, Limited, having been employed by said company since August 1, 1933.

That on Saturday morning, September 14th, 1946, Mr. K. B. Tester called me by phone, about 7:00 a.m., and advised me that there were approximately 500 strikers gathered around the entrances of our factory, and that they had refused to permit any of our factory workers to enter the factory. These employees were of the supervisory force. He further stated that he had called the Chief of Police, E. Crowell, and that he was present but had not yet opened up an entrance for our employees through the large group of strikers. I arrived on the scene about ten minutes later, and entered the factory grounds by the back entrance, which was the shortest way for me to go, and drove slowly through the crowd of strikers, and got out of my car and asked Chief Crowell what he was going to do. He told me to "wait." A few minutes later I again approached Chief Crowell and again he said for me to "wait"; I did this several times. He in the meantime was in a huddle talking to the leaders of the union.

Thinking that it might be a good thing to have Mr. C. A. Rice, Chairman of the Police Commission, see this gathering, and further that undoubtedly he could give Chief Crowell verbal advice, I attempted to contact Mr. Rice over the phone but was unable to locate him. I then approached the Chief and advised him that I had been trying to get Mr. Rice by phone, but was unable to do so, and recommended that it [142] might be well for him to dispatch an officer to bring Mr. Rice so that he might have Mr. Rice's advice. I believe that Chief

Crowell dispatched an officer for this purpose. I then went to my office to phone to Honolulu and was notified by Mr. Paul H. Townsley, Office Manager, that Mr. Rice had just called at the Post Office and was undoubtedly at home. I called him and advised him of the situation and he immediately went down to see the Chief of Police. At this same time I advised Mr. A. McKeever, who is a member of the Police Commission, and he later went to the factory entrance and spoke to Chief Crowell.

I believe that it was after Mr. C. A. Rice had talked to Chief Crowell that I again approached the Chief and in the presence of Mr. K. B. Tester, asked him again to open up the road so that our employees might enter the factory. He again told me to "wait." A little later he approached me for the first time and in the presence of Mr. K. Tester, and Mr. R. Smith, advised me that the union officials were willing to permit the Manager, Assistant Manager, Mr. T. Watt and possibly Mr. R. Smith, to enter the factory, and asked whether that was satisfactory. I told the Chief that we were asking for the road to be opened so that anyone who had business in the factory could enter. I again told the Chief of Police that we wished the law to be enforced, and the road to be opened. He stated that if that were attempted there would be bloodshed, and my reply to that was that while we did not want bloodshed, that if he felt there would be I would recommend that he get a sufficient force of policemen on the scene so that this could not

occur. Following this I told our employees, who had been standing around since early morning, that they should go home and get their breakfast. Some of the boys had already had breakfast, but most of them left the scene. I also left for my home, but on thinking the situation over, when I was half way home I decided that it would be a wiser move to send all of our employees, who had gathered at the mill entrances, home and have them remain there until the road [143] entrances were legally opened. I returned and advised Chief of Police Crowell, in the presence of Mr. Charles Fern, I believe, of what I intended to do, stating that the purpose of so doing was to reduce the chance of violence—he approved of this action. I immediately spoke to Watt and the other men who were there and advised them to go home and remain away from the factory until the entrances were opened.

At approximately 12:45 p.m., on Saturday afternoon, September 14th, 1946, I drove by the main entrance to the factory and did not see many men in the picket line, and for that reason I backed up to the entrance where the policeman was on duty and asked him if the road had been officially opened. He stated that he did not know; but while I was backing up, and while I was talking to the policeman, a large group of men came out from under the trees and solidly blocked the entrances making it very evident that they were still refusing to let any of our employees enter the factory.

Later on in the afternoon Mr. Smith and I were advised that the strikers had barricaded all en-

trances to the factory. We went down to inspect it and found this to be true—they had strung string and wire across all entrances and some pickets were still there.

This morning, Monday, September 16th, 1946, at approximately 7:45 a.m., I drove down to the main entrance of the factory and saw that they were still maintaining their strong picket line. I stopped there and asked Policeman Joe Carvalho whether the entrance was open and he replied that they were still picketing the factory—which was very evident.

Further affiant sayeth not.

/s/ C. E. S. BURNS.

Subscribed and sworn to before me this 16th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My Commission Expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above-entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [145]

PETITIONER'S EXHIBIT NO. 20

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, John Travasso, being first duly sworn, do depose and say as follows:

That I am employed as camp policeman of The Lihue Plantation Company, Limited, having been employed since 1926.

That on September 14, 1946, I was the first man to get to the garage which is my station at the mill every morning; I arrived about 4:30 a.m. Then, after I was there a little while, Mr. Buddingh, Tony Camara and Norbert Penna came to the station and we were all together. Then James Langley joined us, and after this, Mr. Tester. When I first arrived, no one else was around. I am not quite sure, but I think it was about 5:00 or 4:45 a.m. when they started to picket the place. When they started to make this revolution, that is when Mr. Tester was about to start for Hanamaulu; they piled around his car. Then he stopped his car. Then Mr. Buddingh and the two other boys started to go into the mill. Then the crowd started to push, push, push and the three got only as far as the warehouse. Then came Mr. Watt and they didn't let him go in and piled up around his car and started to call him "scab," and "a dog with two legs," and "a dog is a scab with two legs." He stopped his car

and didn't make any move—only Mr. Langley and myself were left at the station—and they said: “You are the last ones now—we are going to get you”—and to Mr. Langley they said, “You are the last ones we will get today—you cannot go hana-wai today.” So Mr. Langley told me, “You had better go [146] home, John.” So I thought to myself, “No sense in staying here, because no one is going to get in the mill,” so I went to my car and they asked me if I was going to hana-wai, too—so I told them “I am not a Hana-wai luna, I am only a Camp Policeman, I don't bother with hana-wai,” and they told me, “Alight then, keep a-going.” They called all kinds of names and lots of things I don't remember, but they were very noisy, in fact, terrific, and made so much noise we could not understand what was going on. I left about 6:15 a.m.

Further affiant sayeth not.

/s/ JOHN TRAVASSO.

Subscribed and sworn to before me this 15th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My Commission Expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above-entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [147]

PETITIONER'S EXHIBIT No. 21

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, Frank Barretto, being first duly sworn do depose and say as follows:

That I am employed as Mill Shift Engineer, of The Lihue Plantation Company, Limited, having been employed by said company since 1907.

That on September 14th, 1946, I reported for work at the mill about 6:15 a.m. When I arrived in my car the approach to the mill yard was blocked by 300 to 350 union pickets. The pickets blocked the mill road entrance and stood in a mass about 10 feet deep. Pickets were shouting and calling names—some of which were “scabs—traitors.” Messrs. H. Buddingh, R. Watt, H. Cheatham, K. Tester and A. Camara were present. I parked my car behind the other supervisor's cars which had been stopped. When I got out of my car the pickets started booing and calling again. They shouted “down with the scabs,” etc. Two police officers were there when I arrived and Chief Crowell and another policeman arrived later. Chief Crowell talked to the pickets, but I did not hear what he said. While I was there the police did not attempt to open the picket lines. I stayed until about 9:30 a.m., when Mr. R. Watt told us to go home.

That during the entire time I was there the pickets were massed in a group and I believe, because of their temper and anger together with their actions, that no one could have crossed the picket lines. In the picket group I recognized Ben Iida, Jr., Frank Gonsalves, Alex Carreira, and many others. [148]

Further affiant sayeth not.

/s/ FRANK BARRETTO.

Subscribed and sworn to before me this 15th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My Commission Expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above-entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [149]

PETITIONER'S EXHIBIT No. 22

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, Ira W. Newton, having been first duly sworn,
do depose and say as follows:

That I am employed as Assistant Mill Engineer
of The Lihue Plantation Company, Limited, having
been employed by said company since 1934.

I arrived for work at the entrance of the mill
yard at about 6:15 a.m. on September 14, 1946. I
drove into the main mill entrance in my car, but
was unable to enter the mill yard because the road-
way was blocked by pickets. I would say there
were between 350 and 500 of them. These pickets
were 4 to 7 deep in lines and were shouting as I
approached. I got out of my car which was stopped
about 15 feet from picket lines. Mr. Buddingh,
Mr. Watt, Mr. Cheatham, Mr. Tester, Mr. Rosa
and some other foremen were present. The pickets
shouted to me when I got out of the car, "Here
comes another scab foreman." Charles Morita, one
of the pickets, said, "Newton, you are a scab! Why
don't you start repairing the big lathe?" The
shouting and cat-calling continued from the pickets
until we were sent home at 9:00 a.m. by Tom Watt.
These pickets were on the plantation property from
the time I arrived until I left at about 9:00 a.m.

To the best of my knowledge, it would have been impossible to have [150] passed through the picket lines and enter the mill yard.

Further affiant sayeth not.

/s/ IRA W. NEWTON.

Subscribed and sworn to before me this 15th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My Commission Expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above-entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [151]

PETITIONER'S EXHIBIT No. 23

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

County of Kauai,
Territory of Hawaii—ss.

I, James P. Langley, being first duly sworn do depose and say as follows:

That I am employed as Division Overseer, of The Lihue Plantation Company, Limited, having been employed by said company since 1931.

That at about 8:30 a.m., on September 2, 1946, Mr. Burns, plantation manager, stopped by my house and reported to me that water was running on the road below Lihue field 3A, I went up and investigated and found the gates meddled with and water not running into the reservoir properly but going into Field 3A. Water was all over the road—I adjusted the gates in the proper order.

On September 3rd, 1946, I told Joe Amaral, Section Overseer, that we should throw the overflow water from the mill in one of the big cane fields, Lihue 30A and Lihue 32B, rather than waste it. This was done and we were not interferred with in doing this on this day.

On September 4th, 1946, at sometime during the morning, Augustine Lomingkit, Irrigation Foreman, reported to me down by Lihue 30A that a car bearing four or five men, one of Japanese ancestry, and the others Filipino, had told him not to turn water in the field. Joe Amaral, Section Overseer, also reported to me that he had visitors at his house the previous night who had told him not to turn water in the field. Joe Amaral acted accordingly and he himself did not turn any more water. That same afternoon I reported these water activities to Mr. Burns, Mr. Tester, and Mr. R. Smith, our Director of Industrial Relations. I told them [152] at that time that water from the reservoir was now being thrown into Lihue 29.

On September 5th, 1946, in the morning, shortly after 6 a.m., I, myself, put a ditch board in Lihue 35-B, because the reservoir was overflowing and rather than have the water wasted, dumped it there.

Then along about 9:30 of that same morning H. Kagehiro, Irrigation Foreman, reported to me that the board had been taken out of there. Said he had seen a car stop there while he was on his horse some distance away but did not recognize the parties and did not actually see them take the board out. I checked it myself and true enough the board was gone. Reported these incidents to Mr. Burns and Mr. K. Tester, late in the afternoon at the office. That same day I met Gisao Tateishi, head of the East Kauai Water Company, a part of the plantation, along the Government road and he asked me if I realized the reservoir at Lihue 20 was so full of water. I said "yes." He said it would be better to keep it down in the event there was a storm, I said I would take care of it.

Through Augustine Lomingkit, Irrigation Foreman, I learned that Guillermo Espiritu had been at Lihue 20 reservoir for three days. Espiritu is a regular reservoir tender, but now on strike. I went to Joe Amaral's house at pau hana and asked him if he was aware of this. He said he had not reported it to me since the union was taking the time of Espiritu and did not think it necessary. I came upon this Guillermo Espiritu at about 3 p.m., at the reservoir and he told me that some women had driven by and asked if he knew that water was being put into the fields. He also told me that a union man from the mill had been by in the morning to check up as to a report that someone was throwing water into Lihue 35B.

On September 6, 1946, I met Mr. K. Tester in the afternoon at 1:30 p.m., and together we drove down to the Lihue 20 reservoir and I opened up the reservoir and put on a lock, then we drove down to Lihue 35B, where we put in a gate there and waited along the garbage road for about two hours to see if any one would come [153] along and disturb the gate. No one came, so we left there at 3:30 p.m.

On September 7th, 1946, when I came home, shortly after 7 a.m., for breakfast, after I got into the house, I saw in the front of my house approximately 20 to 30 men gathered there. After a bit I went out into the yard and they yelled "Langley Scab," "Go out and hanawai, go to the fields, come out." After an hour or so at home I drove on out, I drove down to the office and reported the incident to the office.

Sometime after lunch, about 1:30 p.m., I drove out of the yard of my home and as I drove down the hill noticed immediately a car following me, with John Leonard Costa, a Portuguese boy driving and two Filipinos in the car, all employees of the company and now on strike; the names of the others are unknown. I turned into the Post Office, went across to the office where Bunt Baldwin, Hanalei Division Overseer, was standing, and conversed with him ten minutes or so. When I drove into the Post Office this yellow striped car turned into the Post Office on the right side and stopped there. I said to Bunt "that bunch is following me." He wanted to know if I wanted to accompany him and I said I had already called Mr. Donald Seaton,

a retired plantation office worker, that I would pick him up so then I went across to the Post Office to see if there was any mail, and I picked up a newspaper and came back to my car. All the time the yellow car remained there. Then I backed up and drove out onto the highway and finally turned in by Seaton's yard. Mr. Seaton came to the door and I said "did you hear the news," "no," he said—well, I said, "our house has been picketed," then I went into his house and stayed and conversed for five or ten minutes. In the meantime I kept peering through the window and could see Costa's car parked beyond a nearby garage. Then Mr. Seaton and I drove out and we drove on up to my home. The yellow car followed us up and parked in front of my place while we were in there. I called Keith Tester about 2 p.m., and arranged to meet him at the office. Then I drove down and again the yellow car followed—we drove into the back of the office and the yellow car [154] stayed by the tennis courts then Mr. Seaton and I went into Mr. Tester's office where I related my story of being followed to Mr. K. Tester. Then we left and later turned in by Lihue 18—Keith Tester and Donald Seaton were to be in my car and Mr. Goodale Moir, of American Factors, Limited, in Honolulu, was to follow the yellow car. As we drove down past Kress & Company, the yellow car kept a good distance behind us. Then we turned into Lihue 18, on the plantation road, and when we got in and saw that the yellow car was following us, Keith Tester said to

stop my car by the last pole before hitting the railroad crossing. Costa's car had already stopped within the plantation road with Mr. Moir behind him, so Mr. Tester told me to back up—which I did. He said you stay in the car while I get out and question. Seaton stayed with me, and later he got out. After questioning by Mr. Tester, which I did not hear, Tester went back to phone the police. They arrived: Capt. Fernandez and Ferreira. Keith Tester came along with them. Then I got out of my car and walked past the yellow car where the two Filipinos and Costa were sitting. Then we drove ahead to give Costa a chance to turn around and go back with the police. We did not hear what was done about this.

Then Tester and Seaton with me drove on down toward Lihue 32B. Tester said I might as well take the gates out so that I won't be bothered tomorrow, going out into the fields, being Sunday. I took the water gate out of 32B Lihue, then we drove to Lihue 35B where Keith Tester took out a gate, and finally a gate was taken out of Lihue 29.

All of the above indicates to me that any effort on my part or on the part of any other person to open gates or otherwise attempt to irrigate would be interfered with and all efforts made by the union and the strikers to prevent such; that any attempts to do this work would be at the risk of further picketing of homes including my own and those of others connected with such work, trailing of [155] employees, with possible threats and annoyance.

Any serious effort of systematic irrigation would be completely prevented by the union and the strikers, in my estimation.

Further affiant sayeth not.

/s/ JAMES P. LANGLEY.

Subscribed and sworn to before me, this 15th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My Commission Expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above-entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept., 17, 1946. [156]

PETITIONER'S EXHIBIT No. 24

Lihue, Kauai

January 14, 1946

Lihue Plantation Co., Ltd.

Lihue, Kauai

Gentlemen:

Will you please recognize the following 1946 officers of Local 149 Unit 1:

President, Joseph Nunes; 1st Vice-President, Daniel F. Rapozo; 2nd Vice-President, Fernando Fontanilla; Recording Secretary, Tom Takemoto; Financial Secretary, Sunao Iwamoto; Sergeant-at-Arms, Peter Contrades, Daniel Ferreira, Ignacio Mercado; Trustees, Santos Barbasa, Shoichi Iwasaki, Charlie Sasaki.

Yours very truly,

ILWU LOCAL 149,

/s/ Y. MORIMOTO,

Business Agent.

YM:k

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 17, 1946. [157]

In the Circuit Court of the Fifth Circuit
Territory of Hawaii

At Chambers In Equity

In Open Court, Tuesday, September 17, 1946

Court Convened at 10:10 A.M.

Present: Honorable Philip L. Rice,

Judge Presiding;

Kenichi Umemoto, Court Reporter;

John Ilalaole, Jr., Courtroom Clerk.

Equity No. 120

THE LIHUE PLANTATION COMPANY,

LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO),
LOCAL 149 OF THE INTERNATIONAL
LONGSHOREMEN'S AND WAREHOUSE-
MEN'S UNION (CIO), UNIT 1, LOCAL 149,
OF THE INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S UNION
(CIO), JOSEPH NUNES, DANIEL
RAPOZO, FERNANDO FONTANILLA,
THOMAS TAKEMOTO, SUNAO IWA-
MOTO, WILLIAM PAIA, YOSHIKAZU
MORIMOTO, BENJAMIN IIDA, GEORGE
MASAKI, CHARLES MORITA, RONALD
TOYOFUKU, TAKU AKAMA, JOHN DOE,
et al.,

Respondents.

HEARING ON PETITION FOR
INJUNCTION

Appearances:

Ernest C. Moore, Jr., Esq., of Vitousek, Pratt &
Winn, attorneys for petitioner.

Abraham G. Kaulukou, County Attorney, County of Kauai, T. H., *amicus curiae*.

As the walls of the courtroom of this court were being soundproofed and the courtroom therefore not being available, the hearing on the petition for injunction and for the issuance of an order to show cause was had in open court in the jury-room of this court.

The Court stated that the Court had advised Mr. E. Moore, representing Vitousek, Pratt & Winn, attorneys for petitioner, that the Court desired preliminary argument on the law of the case, to wit, the question of jurisdiction of the Court.

The Court also raised the question, for the purpose of argument, of whether a manager, not being an officer of a corporation, might legally proceed in such matter without specific authorization by the Board of Directors, the Court having noted that the petition was signed by C. E. S. Burns, manager of the Lihue Plantation Company, Limited. Mr. Moore stated that they assumed, in view of the urgency of the matter coming up, and the fact that Mr. Burns is manager on this island and the main offices being in Honolulu, that that would be sufficient for the purpose, but that if the Court required further authorization he could obtain that immediately.

The Court further stated that there is no allegation in the petition that the Police Department of the County of Kauai was unwilling or unable to act and, in the light of decisions of the United States Supreme and Circuit Courts, the Court [158] questioned the right to issue an injunction where there

is a labor dispute and there is no showing that the executive department of the government—in this instance the police department—is unable or unwilling to act. The Court also raised the question as to whether our Territorial courts are courts of the United States, and particularly whether a circuit judge who holds his commission by virtue of appointment by the President of the United States with the consent of the Senate of the United States and who receives his salary from federal funds, is, when acting as the circuit judge, a court of the United States within the meaning and intent of the Norris-LaGuardia Act.

The Court also raised the question as to whether the National Labor Relations Act ousts the circuit courts or any state court of jurisdiction in matters which arise out of labor relations covered by the National Labor Relations Act.

Mr. Moore presented argument upon the questions raised by the Court. In this connection he gave the following citations and authorities:

83 L. Ed. 189 (1938);

4 Enc. U. S. Supreme Court Reports, p. 885;
1154 A;

Constitution of the United States Annotated,
p. 444;

141 U. S. 174; 35 L. Ed. 693;

Allen v. Myers, 1 Alaska 114 (1901);

48 U. S. C. A. 1018, p. 13;

123 A. L. R., p. 656;

14 N. E. (2d) 991;

306 U. S. 642;

Teller Labor Disputes and Collective Bargaining, Vol. 1, Secs. 124 & 125;
257 U. S. 184;
159 Fed. 500;
115 Pac. (2d) 553;
29 Atl. (2d) 183;
28 N. Y. Supp. (2d) 303 (1941);
27 N. Y. Supp. (2d) 718;
5 N. Y. Supp. (2d) 575;
124 A. L. R. 744;
179 Miss. 3551; 229 N. W. 311;
265 N. W. 302;
285 N. W. 903;
46 Atl. (2d) 16;
22 N. E. (2d) 120.

Mr. Moore further stated that he would present oral testimony to the effect that in various instances the police authorities had been called, but no effective action had been taken by them.

The Court then proceeded with the hearing of evidence in support of the petition.

Counsel then presented affidavits of various individuals and the Court received same in evidence and ordered same marked as petitioner's exhibits as follows:

- No. 1—Affidavit of Ronald G. Watt.
- No. 2—Affidavit of Keith B. Tester.
- No. 3—Affidavit of Antone Camara.
- No. 4—Affidavit of Hale C. Cheatham.
- No. 5—Affidavit of Wm. A. H. Buddingh.
- No. 6—Affidavit of Norbert Penna.

- No. 7—Affidavit of Courtland E. Ashton.
- No. 8—Affidavit of Leonard T. Cannon.
- No. 9—Affidavit of Alexander G. Hutton.
- No. 10—Affidavit of Harry Nogami.
- No. 11—Affidavit of Courtland E. Ashton.
- No. 12—Affidavit of William A. H. Buddingh.
- No. 13—Affidavit of Ronald G. Watt.
- No. 14—Affidavit of John S. Carvalho.
- No. 15—Affidavit of Mary Soares.
- No. 16—Affidavit of Georgina Rosa.
- No. 17—Affidavit of Mr. & Mrs. Antone
Camara.
- No. 18—Affidavit of Mr. Charles J. Fern.
- No. 19—Affidavit of C. E. S. Burns.
- No. 20—Affidavit of John Travasso.
- No. 21—Affidavit of Frank Barretto.
- No. 22—Affidavit of Ira W. Newton.
- No. 23—Affidavit of James P. Langley.

The Court took notice of a motion for temporary restraining order attached to the file in this matter and inquired of Mr. Moore whether he intended filing it. Mr. Moore stated that he did and that it was based upon the issuance of the order to [159] show cause. The Court stated that the evidence might be considered in both matters and that the Court would like to have the testimony of some of the affiants as to the essential facts on which Mr. Moore relied for injunctive relief.

Court recessed at 11:15 a.m. and reconvened at 11:35 a.m.

Counsel for petitioner was present in court.

Mr. C. E. S. Burns, having been called and duly sworn, testified in substance as follows: That he resides in Lihue, Kauai; that he is the general manager of the Lihue Plantation Co., Ltd., petitioner herein; that the plantation employees have been on strike since September 1, 1946; that at approximately 7 o'clock on the morning of the 14th of September, Mr. Tester called him by phone and told him that there was a mob of strikers surrounding the entrance of the mill and that they were refusing to let the supervisory force to enter the factory; that he immediately proceeded to the mill; that he entered the mill through the back entrance through a crowd of pickets; that he approached the Chief of Police, Edwin Crowell, and asked him what he intended to do; that the chief told him to wait; that the chief talked with a group of strikers; that he approached the chief several times and each time the chief told him to wait; that the chief finally told him that the union leaders would permit only the manager, the assistant manager, Mr. Watt and possibly Rockwell Smith to enter the mill; that he again requested that the entrances to the mill be cleared; that he viewed the situation as hopeless for the time being and told his employees to return to their homes until further notice; that upon his request Mr. Charles Rice, chairman of the police commission of Kauai and Mr. A. McKeever, member of the police commission of Kauai, came over to view the situation.

Mr. Burns further testified that he has valuable equipment in the mill, including utility equipment;

that the two hydro power stations situated in the mountains supply the current to Lihue when the mill is not operating; that for several days the load on the power lines was just about what the hydro stations could supply; that if that load is more than the power produced by the hydro stations, then it has been customary for Mr. Cheatham to cut off some of the lines; that the only way to do that is through the switch board in the mill; that Mr. Cheatham was not allowed to enter the mill to do this; that the hydro plants supply the electrical current for the community of Lihue.

Upon further questioning witness further testified that the attitude of the strikers on September 14, 1946, was very boisterous; that when he approached the strikers with his car, they were reluctant to move out of the way and yelled at him; that he was shouldered once when walking through the line; that on September 17, 1946, there was a large group of strikers around the office building of the company; that after inquiry in the office a number of employees were not present; that the employees later phoned that they had not been permitted to enter the office; that no one was permitted to enter the mill; that the three entrances to the mill were blocked; that he had to force his way through the picket lines with his car; that the strikers were all on plantation property; that he feels that the law is not being enforced; that he thinks it will be worse as soon as the mob learns that the police will not enforce the law; that the pickets were not invited there.

Mr. C. E. Ashton, having been called and duly sworn, testified in substance as follows: that he resides in Lihue, Kauai; that he is the head sugar boiler engineer for The Lihue Plantation Co., Ltd.; that the employees of the firm have been on strike since September 1, 1946; that on September 14, 1946, on his way to work he found the entrance to the mill jammed with strikers; that he was not permitted entry into the mill; that the mob was yelling; that he asked the police what they intended to do and they said that they had to wait until the chief arrived; that he saw no one gain entrance to the mill; that from the attitude of the mob it was quite apparent they would not let anyone into the mill; that he tried to go to work on September 16, 1946, but the entrances were still blocked by strikers; that the strikers were on plantation property.

Mrs. Mary Soares, having been called and duly sworn, testified in substance as follows: that she resides in Lihue, Kauai, on plantation land; that she is married; that her husband is a welding foreman of the Lihue Plantation Co., Ltd.; that she has two children, aged 5 and 1; that her husband does not belong to the union; that [160] at present he is not working; that her husband was approached by union members to join the union; that on Thursday, September 12, 1946, at about 8 o'clock in the morning, about 25 union men came up to her house and began yelling "Is this a scab's house"; that they hung around most of the day yelling; that they yelled at her little daughter that her father was a scab; that the road they were on belonged to the plantation.

Court at this time reminded counsel that none of the respondents had been identified by name as yet.

Upon further questioning by counsel, witness herein testified that one of the group that was around her house was George Masaki, member of the union; that the others were also members of the union.

Mrs. Georgina Rosa, having been called and duly sworn, testified in substance as follows: that she resides in Lihue, Kauai, on plantation property; that she is a housewife; that her husband works in the mill as mill engineer of The Lihue Plantation Co., Ltd.; that her husband is not a member of the union, although he was approached to join the union; that on September 11, 1946, a group of union men approached her home and began yelling from the street, "Hey, you scab!"; that they relieved themselves by her home; that she was frightened for her aunt's and baby's sake; that her aunt from Honolulu was just trembling; that her other children coming home from school had to squeeze their way through the pickets to open the gate into the yard; that someone threw some paper into her yard; that she called the police who merely came, picked up the paper, talked to the strikers and went away; that they called me all kinds of names; that there were about 100 of them.

Mr. William A. H. Buddingh, having been duly called and sworn, testified in substance as follows: that he resides in Lihue, Kauai; that he is employed as chief engineer of the mill by The Lihue Plantation Co., Ltd.; that early Saturday morning, Sep-

tember 14, 1946, at about 4 o'clock, he went to the mill; that at that time there were no pickets around; that he went over to the garage to talk to Mr. Travasso; that the pickets began coming in and forming a line soon after that; that they barred him from entering the mill again; that the pickets were on plantation property; that he saw Y. Morimoto, George Masaki and William Paia, representatives of the union, at the picket line; that he again attempted to get into the mill on September 16, 1946, and was stopped; that Morimoto and the other pickets refused to allow him to pass the picket line.

Mr. James P. Langley, having been called and duly sworn, testified in substance as follows; that he resides in Lihue, Kauai; that he is employed by The Lihue Palantation Co., Ltd., as division overseer; that the employees of the plantation are on strike at present and have been on strike since September 1, 1946; that on September 2, 1946, he was informed by Mr. Burns, manager of The Lihue Plantation Co., Ltd., that water was overflowing below one of the fields under his care; that he found the water gates had been tampered with; that he did not see the tampering of the water gates; that his home was picketed on September 7, 1946; that they yelled at him "Langley, you scab"; that they followed him in a car all afternoon; that one of the occupants of the car was John L. Costa, a union member; that he reported the incident to Mr. Tester; that none of his men are working at present; that he feels that the pickets will continue such attempts to interfere with his work.

Mr. Leonard T. Cannon, having been called and duly sworn, testified in substance as follows: that he is a resident of Lihue, Kauai; that he is the assistant manager of the Lihue Store of the Lihue Plantation Co., Ltd.; that the employees are at present on strike; that the store is operating in a very limited way; that 4 restaurants and 2 hospitals only are served; that pickets are preventing the store from being opened; that the union allowed only three people to enter the store, namely Mr. K. Fujii, Mr. W. Albao and himself; that the following people were prevented from entering the store: Mr. U. Ishii, Mr. Sandy Hutton, Mr. H. Nogami, and Mr. Joe Rapozo; that he saw the men stopped; that Mr. Nogami is the maintenance man for the refrigeration plant in the store; that a lot of perishable food will be spoiled if he is not let in to repair the plant.

Mr. Keith B. Tester, having been called and duly sworn, testified in substance as follows: that he resides in Lihue, Kauai; that he is the assistant manager of The Lihue Plantation Co., Ltd.; that at present the employees of the firm are on strike; that the union the employees belong to is known as the I.L.W.U. Local 149, Units 1, 2, and 3, that the union members have not been permitting employees to enter the mill; that on September 14, 1946, he saw the following union representatives [161] in the picket lines near the mill: Mr. George Masaki, Mr. Ronald Toyofuku, Mr. T. Akama, Mr. Y. Morimoto, and Mr. William Paia; that he knew them to be

representatives of the union for he had had dealings with them; that he was the one that called the police on September 14, 1946; that he saw Mr. Burns talking with the chief of police and going over to talk with the chief several times; that he overheard Mr. Burns tell the chief to open up the road; that the chief told Mr. Burns to wait; that Mr. Burns requested the chief to open up the road to everyone; that the chief replied that the union would not open up to everyone, but would allow Mr. Burns, himself, Tom Watt and Rockwell Smith to enter the mill; that the roads are still closed by the union.

Upon further questioning witness testified that the power lines of the two hydro plants are tied up in the mill and that it is absolutely essential that they be looked after; that Mr. Ashton ordinarily looks after the crystallizers.

Mr. Charles J. Fern, having been called and duly sworn, testified in substance as follows: that he resides in Lihue, Kauai; that he was in the vicinity of the Lihue Sugar Plantation Co., Ltd., mill on the 14th day of September 1946; that he witnessed the mass picketing there; that he saw Mr. W. Paia, Mr. Y. Morimoto, Mr. G. Masaki, and Mr. T. Akema, and Matsushima, union members present at the picket lines; that he saw the chief of police conferring with the union representatives; that he overheard the chief tell the union officials to clear the road; that the union officials were waiting the outcome of a phone call to Honolulu by Mr. Morimoto; that the County Attorney had a conference

with the chief of police and told the chief that he couldn't do anything unless someone 'slugged' somebody; that some of the pickets had arm bands on; that when Mr. Morimoto returned from the phone call to Honolulu the picket lines began to mass in front of the entrances; that he asked Morimoto whether he had been instructed to hold the line and the latter replied in the affirmative.

At this time the County Attorney, Mr. A. G. Kaulukou, who had offered to act as *amicus curiae* requested that he be allowed to ask Mr. Fern a few questions. The Court allowed him to do so.

Upon questioning by Mr. A. G. Kaulukou, the witness testified that he did not actually hear Mr. Kaulukou, the County Attorney, use the word 'slugged' when speaking to the chief of police, but that the impression he got out of the County Attorney's advice to the chief of police was that the latter could take no action unless there was an overt act.

Court recessed at 1:25 p.m. and reconvened at 3:03 p.m.

Counsel for petitioner was present in court.

Mr. Keith B. Tester was recalled as a witness for petitioner and testified in substance as follows:

Mr. Tester was handed a document which he identified to be a letter from Y. Morimoto, Business Agent of Local 149, I.S.W.U., to The Lihue Plantation Co., Ltd., listing the names of officers of Local 149, Unit 1, I.L.W.U., for 1946, dated January 14,

1946, which petitioner introduced and the Court accepted in evidence and ordered marked as Petitioner's Exhibit "24."

The Court found that the petitioner had made a *prima facie* showing that the respondents had exceeded the bounds of peaceful picketing, in that they had prevented the employer, through its supervisory employees and the general manager from entering at will the sugar factory of the petitioner; also, that they had prevented free access to the general merchandise store known as Lihue Store and in effect had taken possession and control of both the factory and the store; and that they had also been guilty of mass picketing and the use of intimidation.

The Court also found this case similar to the case of *Westinghouse Electric Corporation v. United Electrical, Radio & Machine Workers of America (CIO) Local 601 et al*, as set forth in the opinion of the Supreme Court of Pennsylvania, recorded in the advance sheets of *Atlantic Reporter*, 2d Series, the citation being 46 A 2d No. 1, at page 16 et seq.

The Court felt that the petitioner herein had shown satisfactory *prima facie* evidence of irreparable damage, not because of any destruction of or injury to its plant, but because of the interruption of vital activities necessary by way of preparation for future business and production; and that, on the instance of the Lihue Store refrigerating plants, it had shown *prima facie* evidence that serious loss might be sustained and if not enjoined might con-

tinue, the amount of which could not be determined at present and could not be taken care of by compensatory damages.

To that extent the Court made the finding that there had been a sufficient showing preliminary to the issuance of an order to show cause, as prayed for in the petition for injunction herein.

Mr. Moore presented a draft of an order to show cause and the Court ordered that same be made returnable on Friday, September 27, 1946, at 9 o'clock a.m. Mr. Moore stated that he desired to file a motion for the issuance of a restraining order and also presented for consideration by the Court a proposed temporary restraining order.

Court adjourned at 3:17 o'clock p.m.

By Order of the Court:

/s/ JOHN ILALAOLE,
Courtroom Clerk.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.



In the Circuit Court of the Fifth Judicial Circuit,
Territory of Hawaii

Eq. No. 120

At Chambers—In Equity

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

MOTION FOR TEMPORARY RESTRAINING
ORDER

Filed at 3:20 o'clock p.m., September 17, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth.

Vitousek, Pratt & Winn, 404 Alexander & Baldwin Bldg., Honolulu, T. H., Attorneys for Petitioner. [164]

To the Honorable Philip Rice, Judge of the above-entitled Court, presiding at Chambers in Equity:

Comes now The Lihue Plantation Company, Limited, and respectfully shows as follows:

I.

That the Lihue Plantation Company, Limited, has this date filed in the above-entitled Court a petition in the above-entitled proceeding against the

International [165] Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilia, Thomas Takemoto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Roe, et al, and petitioning this Honorable Court for an order to issue of and under the seal of this Court directed to said Respondents ordering them to appear ten days from the date of filing of this petition in the above-entitled proceeding and then and there to show cause, if any they have, why the said injunction therein prayed for should not be entered and issued;

II.

That this Honorable Court has this date issued said orders directed to said Respondents as prayed for in the above-entitled proceeding;

III.

That pending a hearing on the Order to Show Cause in the above-entitled proceeding, the Petitioner believes upon its information and belief, that the acts specified in the petition filed in the above-entitled proceeding having been committed by the Respondents therein and now continuing, will continue unless restrained pending a final hearing on the Order to Show Cause issued in the above-entitled proceeding; [166]

IV.

That the commission of said acts as specified in the above-entitled proceeding, will, unless restrained pending a final hearing in said proceeding, cause substantial and irreparable injury to the Petitioner's property;

V.

That the Petitioner has no adequate remedy at law;

VI.

That, in support of this motion for a Temporary Restraining Order, the said Petitioner is prepared to submit to the Court supporting affidavits if the Court so desires.

Wherefore, the Petitioner in the above-entitled proceeding, respectfully moves as follows:

(1) That a temporary restraining order issue out of and under the seal of this Honorable Court restraining and enjoining the Respondents and each of them as set forth in the above-entitled proceeding from in any way committing any of the acts therein specified and in accordance with the prayer for relief of Petitioner as set forth in the Petition filed in the above-entitled proceeding, pending a final hearing and order in said proceeding.

Dated: Lihue, Kauai, T. H., 16th September, 1946.

/s/ C. E. S. BURNS.

Territory of Hawaii,
County of Kauai—ss.

C. E. S. Burns, being first duly sworn, on oath deposes and says, That he is Manager of The Lihue Plantation Company, Limited, the Petitioner named herein; that he has read the foregoing petition, knows the contents thereof and that the allegations contained herein are true and correct, except the allegations made on the information and belief and as to those he believes them to be true.

/s/ C. E. S. BURNS.

Subscribed and sworn to before me this 16th day of Sept., 1946.

[Seal] /s/ HENRY C. WEDEMEYER,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My Commission Expires June 30, 1949.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above-entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [168]

In the Circuit Court of the Fifth Judicial Circuit,
Territory of Hawaii

Eq. No. 120

At Chambers—In Equity

THE LIHUE PLANTATION COMPANY,
LIMITED, Petitioner.

VS.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (ILO), et al;
etc., Respondents.

ORDER TO SHOW CAUSE

Filed at 3:35 o'clock p.m., September 17, 1946.

/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

Vitousek, Pratt & Winn, Alexander & Baldwin
Bldg., Honolulu, T. H., Attorneys for Petitioner.

The Territory of Hawaii to: International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149, of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Roe, et al, Greetings:

Whereas, The Lihue Plantation Company, Limited, has filed in the above-entitled Court a petition against you, praying that a temporary order

issue from and under the seal of this Court restraining and enjoining you as to the matters therein set forth,

Now Therefore, you the said International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), [170] Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Take moto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Roe, et al, are hereby ordered to appear before the Judge of the Circuit Court, Fifth Judicial Circuit, Territory of Hawaii, presiding at chambers in equity, at his Courtroom in Lihue, County of Kauai, Territory of Hawaii, on Friday, the 27th day of September, 1946, at the hour of 9 o'clock a.m., to show cause, if any you have, why the injunction prayed for in said petition should not be issued.

Dated: Lihue, Kauai, T. H., September 17th, 1946.

[Seal] /s/ PHILIP L. RICE,
Judge, Circuit Court, Fifth Judicial Circuit, Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above-entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of Hawaii. [171]

In the Circuit Court of the Fifth Judicial Circuit,
Territory of Hawaii

Eq. No. 120

At Chambers—In Equity

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents,

TEMPORARY RESTRAINING ORDER

Territory of Hawaii to the International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Roe, et al, Greetings:

Whereas, The Lihue Plantation Company, Limited, has filed herein a petition against you praying to be relieved touching the matters therein set forth; and

Whereas, an order to show cause issued from and under the seal of this Court ordering you to appear before the undersigned, Judge of the above-entitled Court, on Friday, the 27th day of September, 1946, at the hour of 9 o'clock a.m., and

Filed at 3:50 o'clock p.m., September 17, 1946.

/s/ SAMUEL H. KIMURA,

File Clerk, Circuit Court, Fifth Circuit, Territory of Hawaii. [172]

Whereas, by supporting affidavits adduced by the Petitioner at the time of the filing of the petition in the above-entitled proceeding it appeared that the acts therein specified and complained of will continue unless restrained pending a hearing on the petition in the above-entitled proceedings:

Now Therefore, pursuant to the prayer of said Petition you, International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Roe, et al, are hereby restrained and enjoined until the further order of this Court from in any way

(a) Interfering with the ingress and egress from the Petitioner's mill, store or other plantation buildings, and premises located in the

County of Kauai, Territory of Hawaii, by the Petitioner, its employees, or any others who may enter said premises for the purpose of performing work or for other lawful occasion;

(b) Threatening violence or using coercion or intimidation by force of numbers or otherwise, or other unlawful means upon the employees of the Petitioner or those seeking employment with the Petitioner, or others lawfully entering upon the Petitioner's premises or proceeding to or from said premises;

(c) Coercing or intimidating employees of the Petitioner or those seeking employment with the Petitioner, by means of threats concerning the safety and welfare of [173] any of the Petitioner's employees families or those seeking employment with the Petitioner; or coercing or intimidating the families of the Petitioner's employees;

(d) Visiting the homes of the Petitioner's employees or persons seeking employment with the Petitioner or approaching, following or trailing any of said persons at any place whatsoever in an offensive, disorderly, threatening or intimidating manner, or in such a manner as to provoke a breach of the peace;

(e) Picketing the homes of the Petitioner's employees or persons seeking employment with the Petitioner;

(f) Making, uttering or circulating any false, deceitful or untrue statements with reference to the Petitioner, its employment prac-

tices, and its employees working therein, or others seeking to work therein;

(g) Mass picketing or other congregating in crowds on or near the premises of the Petitioner;

And in Furtherance Hereof, You are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets stationed at points of ingress and egress to the Petitioner's property, exclusive of the homes occupied by Petitioner's employees, said pickets being hereby enjoined from picketing other than in a peaceful and lawful manner and without interfering with the Petitioner, its employees, or any other persons lawfully seeking to enter or leave the Petitioner's premises; said pickets being also enjoined from otherwise committing any of the acts hereinabove specified. Any persons engaging in picketing to the extent authorized above shall wear armbands reading "Authorized Picket."

Dated: Lihue, Kauai, T. H., September 17th, 1946.

[Seal] /s/ PHILIP L. RICE,

Judge of the Above-Entitled
Court.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above-entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,

Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

In the Circuit Court of the Fifth Circuit
Territory of Hawaii

At Chambers

Equity No. 120

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

CHAMBERS SUMMONS

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of any County of the Territory of Hawaii, or his Deputy; or any Police Officer in the Territory of Hawaii:

You are commanded to summon International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149, of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Take-moto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, Respondents, to appear ten days after service hereof, if they

reside on the Island of Kauai, otherwise twenty days after service, before the Judge of the Circuit Court of the Fifth Circuit sitting at Chambers in the Court Room at Lihue, County of Kauai, to answer the annexed petition of The Lihue Plantation Company, Limited, Petitioner. [176]

And you are further commanded, by order of Hon. Philip L. Rice, Judge of the Circuit Court of the Fifth Circuit to also serve upon each of them, the aforesaid respondents, a certified copy of the Order to Show Cause and a certified copy of the Temporary Restraining Order entered and issued in the above entitled matter.

And have you then and there this Writ with full return of your proceedings thereon.

Witness the Judge of the Circuit Court of the Fifth Circuit, at Lihue, Kauai, T. H., this 17th day of September, 1946.

[Seal] /s/ KENICHI UMEMOTO,
Chief Clerk.

2394 R. L. of 1925. The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day be Sunday or legal holiday, it shall be excluded.

I hereby certify that the foregoing is a full, and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit Territory of
Hawaii

Served the within Summons on.....therein
named as defendant by handing him personally a
certified copy thereof and at the same time showing
him the original, at.....this.....day of.....
19..

.....

Deputy Sheriff.

(or, if defendant is a corporation)

Served the within Summons on.....a corpora-
tion by handing to.....its.....a true and at-
tested copy thereof at.....this.....day of.....
19..

.....

Deputy Sheriff.

Circuit Court Fifth Circuit.....vs.....Cham-
bers Summons.

Issued at 6:35 o'clock p.m., September 17, 1946.

/s/ SAMUEL H. KIMURA

File Clerk.

Returned at.....o'clock..m.,.....19.....,
Clerk.

.....Service.....@ \$1.00 each, \$.....

.....Cop.....@ \$1.50 each, \$.....

Expense\$.....

Total\$.....

Circuit Court of the Fifth Circuit
Territory of Hawaii
Lihue, Kauai

Chambers of Philip L. Rice, Judge

Telegram received at 1:28 p.m. of date thereof.
(Received over telephone from wireless office.)

From Honolulu, Sept. 20, 1946.

Honorable Judge Philip Rice
Judge Fifth Circuit Court
Lihue

Have consulted with justices of supreme court as you requested and am pleased report unanimous agreement you may properly in your discretion permit Mr. Gladstein represent clients in specific cases without local associate counsel being present or irrespective of such association and they recommend he be extended all courtesies.

C. NILS TAVARES,
Attorney General of Hawaii.

Copy to Mr. Richard Gladstein.

Copy to County Attorney, County of Kauai.

/s/ PHILIP L. RICE,
Judge.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory
of Hawaii. [179]

In the Circuit Court of the Fifth Circuit,
Territory of Hawaii

At Chambers—In Equity

In Open Court, Friday, September 20, 1946
Court Convened at 6:05 P.M.

Present: Honorable Philip L. Rice, Judge Presiding; Kenichi Umemoto, Court Reporter; John Ilalaole, Jr., Courtroom Clerk.

Equity No. 120

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

HEARING ON ORAL MOTION

Appearances:

Montgomery E. Winn, Esq., and Ernest C. Moore, Jr., Esq., of Vitousek, Pratt & Winn, attorneys for petitioner; Richard Gladstein, Esq., attorney for respondents; Dudley C. Lewis, Esq., Deputy Attorney General, T. H., amicus curiae.

The Court stated that the Court was pleased to recognize Mr. Richard Gladstein, a member of the Bar of California, who desired to appear specially in this case.

The Court explained that in view of the fact that Rule 15 of the Supreme Court of the Territory of Hawaii purports to require that a foreign attorney, that is, an attorney from another jurisdiction, may appear specially in a case only as an associate with another attorney, the Judge had telephoned to the Attorney General and requested the latter to take the matter up with the Supreme Court and obtain its construction of that rule, and that the Court was pleased to say that the Justices of the Supreme Court had unanimously approved authorization for Mr. Gladstein to appear.

Mr. Gladstein stated that he was appearing on behalf of all the respondents in this matter.

Mr. Dudley C. Lewis entered his appearance as *amicus curiae* and the Court ordered that such appearance be noted.

The Court also noted that Messrs. Winn and Moore, of the firm of Vitousek, Pratt & Winn, were appearing on behalf of the petitioner.

The Court stated that the Court was having this evening session to accommodate Mr. Gladstein because the next day, Saturday, would be a legal holiday.

Mr. Gladstein expressed his appreciation of and thanked the Court for the courtesy of having permitted him to make his motion at unusual hours and stated that he was appearing by virtue of the courtesy of the Attorney General of this Territory, the Justices of the Supreme Court, and the Court, for the purpose of presenting his motion on behalf of the respondents. [180]

Mr. Gladstein then offered an oral motion to the Court to vacate and dissolve the temporary restraining order issued by the Court on September 17, 1946, on three grounds: (1) that the Court is bound as a matter of law, by the provisions of the United States Anti-Injunction Act, popularly known as the Norris-LaGuardia Act, pursuant to which no court of the United States is given the power, since 1932, to issue temporary restraining orders *ex parte* in labor disputes affecting the rights of working men who are on strike and who are engaged in picketing and other concerted activities for the purpose of prevailing in that strike; (2) that even if the Court should hold that, technically, the Norris-LaGuardia Act did not bind the Court, nevertheless, the Court should accept, as a matter of public policy, the principles established in that Act by the Congress of the United States, which should serve as a guide in this case; (3) that the temporary restraining order was so general, uncertain and ambiguous that the respondents could not understand that which they were prohibited from doing and that said order infringed upon rights which are protected by the Constitution of the United States, as stated by the Supreme Court of the United States.

Mr. Gladstein presented oral argument on the three grounds giving the following citations and authorities:

29 USCA Sec 101

186 NY Supp 95, pg 98

255 NY 307, pg. 318

174 NE 690, 73 ALR 669, 694

218 Missouri Appeals 516, 279 SW 232

Court recessed at 7:25 p.m. and reconvened at 7:40 p.m.

Counsel for the petitioner and counsel for respondents and the amicus curiae were present in court.

Mr. Gladstein continued his argument.

Mr. Montgomery E. Winn, counsel for petitioner, presented argument to the Court and cited the following citations and authorities:

30 Hawaii 860

5463 Congressional Record

5479 Congressional Record

5942 Congressional Record

5493 Congressional Record

5502 Congressional Record

469 Congressional Record

4630 Congressional Record

141 US 174, 35 L. Ed. 493

35 L. Ed. 693

Vol. 3 CCH Labor Law, par 62, page
975

Vol. 1 Teller, Sec. 124

Vol. 28 Am. Jurisprudence 432, Sec 256

310 US 88

312 US 219.

Court recessed at 9:45 p.m. and reconvened at 10:10 p.m.

Mr. Lewis, as amicus curiae, stated that the circuit courts of the Territory of Hawaii are not courts

of the United States and quoted the following citations and authorities:

303 US 201, 82 L. Ed. 748

82 L. Ed. page 748

House Reports 669, 72d. Congress, 1st Session.

Counsel for the respondents offered a short rebuttal.

Court recessed at 9:45 p.m. and reconvened at 10:10 p.m.

Counsel for petitioner, counsel for respondents and the amicus curiae were present in court. [181]

The Court found that no sufficient showing had been made warranting the dissolution of the restrain order as a whole and therefore overruled the motion to that effect, but stated that the Court desired to take under consideration, of its own motion, a possible modification of the restraining order. The Court, therefore, continued the matter until Monday, September 23, 1946, at 1 o'clock p.m.

Court adjourned at 10:20 p.m.

By Order of the Court.

/s/ JOHN ILALAOLE, JR.,

Courtroom Clerk.

I hereby certify that the foregoing is a full, true and correct copy of the original in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [182]

COURT'S EXHIBIT No. 1

RADIOGRAM

Ihufwad 140 Drush Honolulu 23
Honorable Judge Philip L. Rice
Judge of the Fifth Circuit Court
Court House Lihue

Confirmation copy telephoned Sep. 23, 1946, to
Nakamura by F.W. Time 146 P Date 9/23/46

Re hearing today on possible modification restraining order Lihue Plantation Company case we have instructed our attorneys Richard Gladstein and Richard Mirikitani not to appear, although the court has set hearing for today we have not actually been ordered to appear inasmuch as we regard the court's ex parte restraining order as improperly issue in excess of jurisdiction and denying union members due process of law we see no purpose in being represented at a hearing to modify an order which in the first place we consider to be void and issued in clear defiance of our constitutional right to be heard in advance of being judged once again we ask you to vacate the restraining order.

INTERNATIONAL LONGSHOREMEN'S
AND WAREHOUSEMEN'S UNION,
JACK HALL,
Regional Director.

I hereby certify that, exclusive of the printed portion of the Radiogram form on which the original in the file appears, the foregoing is a full, true,

and correct copy of the original of the "Court's Exhibit No. 1" in Equity No. 120 in the files of the Circuit Court, Fifth Circuit, Territory of Hawaii.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

[Endorsed]: Filed Sept. 23, 1946. [183]

In the Circuit Court of the Fifth Circuit
Territory of Hawaii

At Chambers—In Equity

In Open Court, September 23, 1946

Court Convened at 1:37 P.M.

Present: Honorable Philip L. Rice, Judge Pre-
siding; Kenichi Umemoto, Court Re-
porter; John Ilalaole, Courtroom Clerk.

Equity No. 120

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

HEARING ON ORAL MOTION

Appearances:

Montgomery E. Winn, Esq., and Ernest C. Moore,
Esq., of Vitousek, Pratt & Winn, attorneys for peti-

tioner; Dudley C. Lewis, Deputy Attorney General, T. H., *amicus curiae*; Joseph Nunes, one of the respondents.

The Court noted the appearance of Mr. Winn and Mr. Moore, attorneys for petitioner, and Mr. Lewis, *amicus curiae*.

The Court noted the absence of Mr. Richard Gladstein, attorney for respondents.

The Court called the names of the respondents. Mr. Joseph Nunes, one of the respondents, was the only one present in court.

The Court stated that after careful consideration of the pleading and argument adduced at the hearing upon the oral motion to vacate and dissolve the temporary restraining order, the Court had decided, on its own initiative, to modify the temporary restraining order and substitute therefor an amended temporary restraining order; that such modification was being made for the purpose of clarifying—where the Court felt that clarification might properly be made—the original temporary restraining order; that upon careful re-examination of the petition the Court in the first instance inadvertently failed to note the absence of an allegation in the petition upon which to base a prayer with respect to a particular paragraph of the original temporary restraining order—the Court referring to paragraph (f) of the petition and of the original temporary restraining order.

The Court handed counsel for petitioner, the *amicus curiae*, and Mr. Joseph Nunes, copies of the proposed amended temporary restraining order.

The Court read the proposed amended temporary restraining order.

Court recessed at 2:02 p.m. and reconvened at 2:15 p.m.

Counsel for petitioner and amicus curiae were present in court.

The Court amended the proposed amended temporary restraining order as follows: by striking out the word “interfer—” on line 2, page 5, and the words “ing with” on line 3, page 5, and substituting therefor the word “obstructing.”

The Court read a telegram received from Jack Hall, Regional Director, I.L.W.U., giving reasons for the absence of Mr. Richard Gladstein. Court ordered that the telegram be marked as Court’s Exhibit “1.”

The Court signed the amended temporary restraining order and ordered that same be filed.

Court adjourned at 2:16 p.m.

By order of the Court.

/s/ JOHN ILALAOLE, JR.,
Courtroom Clerk.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

In the Circuit Court of the Fifth Circuit
Territory of Hawaii

Eq. No. 120

At Chambers—In Equity

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

AMENDED
TEMPORARY RESTRAINING ORDER

Filed at 2:16 o'clock p.m., September 23, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii. [186]

Territory of Hawaii to the International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Roe, et al. Greetings:

Whereas, the Lihue Plantation Company, Limited, has filed herein a petition against you praying to be relieved touching the matters therein set forth; and

Whereas, an order to show cause issued from and under the seal of this Court ordering you to appear before the undersigned, Judge of the above entitled Court, on Friday, the 27th day of September, 1946, at the hour of 9 o'clock a.m., and [187]

Whereas, a Motion for Temporary Restraining Order was also filed and, by supporting affidavits and evidence adduced by the Petitioner at the time of the filing of the petition in the above entitled proceeding, it appeared that the acts therein specified and complained of will continue unless restrained pending a hearing on the petition in the above entitled proceeding; and

Whereas, pursuant to the prayer of said petition and the said motion, a Temporary Restraining Order was issued on the 17th day of September, 1946, and subsequently the Respondents, by Richard Gladstein, acting in their behalf and as their attorney, entered an appearance and presented an oral motion to dissolve and vacate said Temporary Restraining Order, and a hearing thereon was had before the Court, to wit, the undersigned, the Circuit Judge of the Fifth Circuit, Territory of Hawaii, At Chambers, In Equity, Petitioners being represented thereat by Attorneys Montgomery E. Winn and E. C. Moore, of Vitousek, Pratt, and Winn, and Dudley C. Lewis, Esq., Deputy Attorney

General of the Territory of Hawaii, appearing at the request of the Court and as amicus curiae, and the Court, after hearing and considering argument on said motion having overruled the same and having given notice to the parties to appear at, and continued proceedings until the 23d day of September, 1946, so that the parties might then be advised if the Court should then, upon its own initiative, modify, the aforesaid Temporary Restraining Order;

Now, Therefore, after consideration and deliberation, the Court does, on this 23d day of September, 1946, modify the aforesaid Temporary Restraining Order; and

It Is Ordered that said Temporary Restraining Order be, and it hereby is modified to the extent hereof and by substituting therefor of this Amended Temporary Restraining Order; [188]

Wherefore, you, International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Roe, et al., are hereby restrained and enjoined until the further order of this Court from in any way

(1) Obstructing or attempting to obstruct, by massing of pickets or otherwise, the ingress to or egress from the Petitioner's mill, store or other plantation buildings or premises located in the County of Kauai, Territory of Hawaii, of the Petitioner, its employees, or any others who may enter or desire to enter said premises for the purpose of performing work or for other lawful occasion;

(2) Obstructing or attempting to obstruct, by massing of pickets or otherwise, freedom of movement on or along the public or private roads or ways in or about the Petitioner's premises, of the Petitioner, its employees, or any other persons who may pass or desire to pass on or along said roads or ways for the purpose of performing work or for other lawful occasion;

(3) Obstructing or attempting to obstruct the free movement in, on or about the Petitioner's premises, of the Petitioner, its employees, or any other persons who may be in, on or about said premises for the purpose of performing work or for other lawful occasion;

(4) Threatening violence to, intimidating, or coercing, or attempting to intimidate or coerce, the employees of the Petitioner or those seeking employment with the Petitioner, or any persons who are lawfully upon the Petitioner's premises [189] or are proceeding to or from said premises;

(5) Coercing or intimidating, or attempting to coerce or intimidate, employees of the Petitioner or those seeking employment with the Petitioner, by

means of threats concerning the safety or welfare of the families of such employees or the families of those seeking employment with the Petitioner; or threatening violence to, or coercing or intimidating, or attempting to coerce or intimidate, such families;

(6) Without express written consent of the occupants thereof, visiting or being at or about the dwelling houses or residence premises belonging to Petitioner and occupied by employees of or persons seeking employment with Petitioner and thereat being offensive, disorderly, threatening or intimidating (in words or actions) towards, and harassing, such occupants, or any of them;

(7) Mass picketing by assembling in compact groups or congregating in crowds on or near real property of the Petitioner, whether used for business or residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property by Petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property;

: And in Furtherance Hereof, you are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets in a group at any point and station when stationed at points of ingress to and egress from the Petitioner's property, provided, however, that any pickets in excess of three (3) at any one point and station, shall be in motion and, except when passing each

other, shall maintain a distance of not less than ten (10) feet between each other and such picketing as shall be done by them shall not be violative of any of the preceding restrictive [190] provisions hereof; all pickets being hereby enjoined from picketing other than in a peaceful and lawful manner and from obstructing the Petitioner, its employees, or any other persons lawfully seeking to enter or leave the Petitioner's premises; and all pickets being also enjoined from otherwise committing any of the acts hereinbefore prohibited. Any persons engaged in such picketing as is not hereby restricted or prohibited shall wear arm-bands reading "Authorized Picket," or "U P."

Dated: Lihue, Kauai, T. H., September 23, 1946.

/s/ PHILIP L. RICE,
Circuit Judge, Fifth Circuit,
Territory of Hawaii.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit Territory of
Hawaii. [191]

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

In the Circuit Court of the Fifth Circuit
Territory of Hawaii

Eq. No. 120

At Chambers—In Equity

Petition for Injunction

Filed at 4:22 o'clock p.m., September 23, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

**ORDER FOR SERVICE OF COPIES OF
AMENDED TEMPORARY RESTRAIN-
ING ORDER**

The Territory of Hawaii to the High Sheriff of
the Territory of Hawaii, or his Deputy; the
Chief of Police of any County of the Territory
of Hawaii, or his Deputy; or any Police Officer
in the Territory of Hawaii:

You are commanded to serve, upon the Respond-
ents above named, certified copies—to wit, so that
each of said Respondents shall be served with one

of such copies—of the Amended Temporary Restraining Order by me, Circuit Judge of the Circuit Court of the Fifth Circuit, sitting at Chambers, In Equity, in the courtroom of the said Court, at Lihue, County of Kauai, Territory of Hawaii, entered and filed this 23d day of September, 1946.

You are further commanded to make a written return of your [192] proceedings in making of service as aforesaid and to file such return with the Clerk of said Court.

Witness my hand and the seal of the Circuit Court, Fifth Circuit, Territory of Hawaii, at Lihue, Kauai, Territory of Hawaii, this 23d day of September, 1946.

[Seal] /s/ PHILIP L. RICE,
 Circuit Judge, Fifth Circuit,
 Territory of Hawaii.

Attest:

 /s/ SAMUEL H. KIMURA,
 File Clerk.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
 Hawaii.

In the Circuit Court of the Fifth Circuit
Territory of Hawaii

At Chambers

Equity No. 120

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

CHAMBERS SUMMONS PETITION FOR IN-
JUNCTION, ORDER TO SHOW CAUSE,
TEMPORARY RESTRAINING ORDER—
OFFICER'S RETURN

Served the within Summons on Yoshikazu Morimoto, therein named as one of the respondents by handing and delivering to and leaving with him personally, at Lihue, Lihue District, County of Kauai, Territory of Hawaii, a certified copy of the said Summons and of the Petition for Injunction, Order to Show Cause and Temporary Restraining Order attached thereto, and at the same time showing him the originals thereof, this 23rd day of September, A. D. 1946.

Dated at Lihue, Kauai, T. H., on the 26th day of September, A. D. 1946.

/s/ RICHARD I. SAKODA,

Captain of Police, County of
Kauai, T. H.

Filed at 11:00 o'clock a.m., September 26, 1946.

/s/ SAMUEL H. KIMURA,

File Clerk, Circuit Court, Fifth Circuit, Territory
of Hawaii.

I hereby certify that the foregoing is a full, true
and correct copy of the original filed in the above
entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,

Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [194]

[Title of Circuit Court and Cause.]

CHAMBERS SUMMONS PETITION FOR IN-
JUNCTION, ORDER TO SHOW CAUSE,
TEMPORARY RESTRAINING ORDER—
OFFICER'S RETURN

Served the within Summons on William Paia,
therein named as one of the respondents, by hand-
ing and delivering to and leaving with him person-
ally, at Kapaia, Lihue, District, County of Kauai,
Territory of Hawaii, a certified copy of the said
Summons and of the Petition for Injunction, Order
to Show Cause and Temporary Restraining Order

attached thereto, and at the same time showing him the originals thereof, this 23rd day of September, A. D. 1946.

Dated at Lihue, Kauai, T. H., on the 26th day of September, A. D. 1946.

/s/ RICHARD I. SAKODA,

Captain of Police, County of
Kauai, T. H.

Filed at 11:00 o'clock a.m., September 26, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [195]

[Title of Circuit Court and Cause.]

CHAMBERS SUMMONS PETITION FOR IN-
JUNCTION, ORDER TO SHOW CAUSE,
TEMPORARY RESTRAINING ORDER —
OFFICER'S RETURN

Served the within Summons on Thomas Take-
moto, also known as Tsutomu Takemoto, Sunao
Iwamoto and Charles Morita, therein named as some
of the respondents, by handing and delivering to
and leaving with each of them personally, at Lihue,
Lihue District, County of Kauai, Territory of Ha-

waii, a certified copy of the said Summons and of the Petition for Injunction, Order to Show Cause and Temporary Restraining Order attached thereto, and at the same time showing each of them the originals thereof, this 17th day of September, A. D. 1946.

Dated at Lihue, Kauai, T. H., on the 26th day of September, A. D. 1946.

/s/ RICHARD I. SAKODA,

Captain of Police, County of
Kauai, T. H.

Filed at 11:02 o'clock a.m., September 26, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [196]

[Title of Circuit Court and Cause.]

CHAMBERS SUMMONS PETITION FOR IN-
JUNCTION, ORDER TO SHOW CAUSE,
TEMPORARY RESTRAINING ORDER —
OFFICER'S RETURN

Served within Summons on Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Benjamin Iida, also known as Benedict Iida, George Masaki, Ronald Toyofuku and Taku Akama, therein named as some of the respondents by handing and delivering to and leaving with each of them personally, at Kapaia, Lihue District, County of Kauai, Territory of Hawaii, a certified copy of the said Summons and of the Petition for Injunction, Order to Show Cause and Temporary Restraining Order attached thereto, and at the same time showing each of them the originals thereof, this 17th day of September, A. D. 1946.

Dated at Lihue, Kauai, T. H., on the 26th day of September, A. D. 1946.

/s/ RICHARD I. SAKODA,

Captain of Police, County of
Kauai, T. H.

Filed at 11:03 o'clock a.m., September 26, 1946.

/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,

Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [197]

[Title of Circuit Court and Cause.]

CHAMBERS SUMMONS PETITION FOR IN-
JUNCTION, ORDER TO SHOW CAUSE,
TEMPORARY RESTRAINING ORDER —
OFFICER'S RETURN

Served the within Summons upon Unit 1, Local 149, of the International Longshoremen's and Warehousemen's Union (CIO), therein named as one of the respondents by handing and delivering to and leaving with Joseph Nunes personally, the person found in charge as president of the said Unit 1, Local 149, International Longshoremen's and Warehousemen's Union (CIO), at its office at Kapaia, Lihue District, County of Kauai, Territory of Hawaii, a certified copy of the said Summons and of the Petition for Injunction, Order to Show Cause and Temporary Restraining Order attached thereto, and at the same time showing him the originals thereof, this 17th day of September, A. D. 1946.

Dated at Lihue, Kauai, T. H., on the 26th day of September, A. D. 1946.

/s/ RICHARD I. SAKODA,

Captain of Police, County of
Kauai, T. H.

Filed at 11:04 o'clock a.m., September 26, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [198]

[Title of Circuit Court and Cause.]

CHAMBERS SUMMONS PETITION FOR IN-
JUNCTION, ORDER TO SHOW CAUSE,
TEMPORARY RESTRAINING ORDER —
OFFICER'S RETURN

Served the within Summons upon Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), therein named as one of the respondents by handing and delivering to and leaving with William Paia personally, the person found in charge as president of the said Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), at its office at Kapaia, Lihue District, County of Kauai, Territory of Hawaii, a certified copy of the said Summons and of the Petition for Injunction, Order to Show Cause and Temporary Restraining Order attached thereto, and at the same time showing him the originals thereof, this 23rd day of September, A. D. 1946.

Dated at Lihue, Kauai, T. H., on the 26th day of September, A. D. 1946.

/s/ RICHARD I. SAKODA,

Captain of Police, County of
Kauai, T. H.

Filed at 11:05 o'clock a.m., September 26, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [199]

SHERIFF'S SUMMONS

Served the within named, Equity No. 120 Chamber Summons, Petition for Injunction, Order to Show Cause and Temporary Restraining Order upon the within named defendant by Personally handing to its representative, a Certified Copy of the Original, at the same time showing to her the Original, at their headquarters, at Pier 11, Honolulu, T. H., on September 21st, 1946.

/s/ LUTHER K. KEKOA,
Deputy Sheriff, City and
County of Honolulu, T. H.

P. S.—Mrs. Rosenthal actually received the documents.

Filed at 11:06 o'clock a.m., September 26, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [200]

In the Circuit Court of the Fifth Circuit
Territory of Hawaii

At Chambers
Equity No. 120

Petition for Injunction

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

ORDER FOR SERVICE OF COPIES OF
AMENDED TEMPORARY RESTRAINING
ORDER AMENDED TEMPORARY RE-
STRAINING ORDER—OFFICER'S RE-
TURN

Served the within Order for Service of Copies of Amended Temporary Restraining Order and Amended Temporary Restraining Order on William Paia, Tsutomu Tateishi as John Doe and Mitsuo Shimizu as Richard Roe, therein named as some of the respondents by handing and delivering to and leaving with each of them personally, at Kapaia, Lihue District, County of Kauai, Territory of Hawaii, a certified copy of the said Order for Service

of Copies of Amended Temporary Restraining Order and Amended Temporary Restraining Order, this 23rd day of September, A. D. 1946.

Dated at Lihue, Kauai, T. H., on the 26th day of September, A. D. 1946.

/s/ RICHARD I. SAKODA,

Captain of Police, County of
Kauai, T. H.

Filed at 3:11 o'clock p.m., September 26, 1946.
/s/ Yukichi Gushiken, Acting File Clerk, Circuit
Court, Fifth Circuit, Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk Circuit Court, Fifth Circuit, Territory of
Hawaii. [201]

[Title of Circuit Court and Cause.]

ORDER FOR SERVICE OF COPIES OF
AMENDED TEMPORARY RESTRAINING
ORDER, AMENDED TEMPORARY RE-
STRAINING ORDER—OFFICER'S RE-
TURN

Served the within Order for Service of Copies of Amended Temporary Restraining Order and Amended Temporary Restraining Order on Daniel Rapozo and Fernando Fontanilla, therein named as some of the respondents by handing and delivering to and leaving with each of them personally,

at Hanamaulu, Lihue District, County of Kauai, Territory of Hawaii, a certified copy of the said Order for Service of Copies of Amended Temporary Restraining Order and Amended Temporary Restraining Order, this 23rd day of September, A. D. 1946.

Dated at Lihue, Kauai, T. H., on the 26th day of September, A. D. 1946.

/s/ RICHARD I. SAKODA,

Captain of Police, County of
Kauai, T. H.

Filed at 3:10 o'clock p.m., September 26, 1946.
/s/ Yukichi Gushiken, Acting Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [202]

[Title of Circuit Court and Cause.]

ORDER FOR SERVICE OF COPIES OF
AMENDED TEMPORARY RESTRAINING
ORDER, AMENDED TEMPORARY RE-
STRAINING ORDER — OFFICER'S RE-
TURN

Served the within Order for Service of Copies of Amended Temporary Restraining Order and Amended Temporary Restraining Order on Joseph Nunes, Benjamin Iida, also known as Benedict Iida, George Masaki, Ronald Toyofuku, Taku Akama, Thomas Takemoto, also known as Tsutomu Takemoto, Sunao Iwamoto, Yoshikazu Morimoto, Charles Morita and Shizuo Hamamoto as John

Doe 1, therein named as some of the respondents by handing and delivering to and leaving with each of them personally, at Lihue, Lihue District, County of Kauai, Territory of Hawaii, a certified copy of the said Order for Service of Copies of Amended Temporary Restraining Order and Amended Temporary Restraining Order, this 23rd day of September, A. D. 1946.

Dated at Lihue, Kauai, T. H., on the 26th day of September, A. D. 1946.

Filed at 3:09 o'clock p.m., September 26, 1946.
/s/ Yukichi Gushiken, Acting File Clerk, Circuit Court, Fifth Circuit, Territory of Hawaii.

/s/ RICHARD I. SAKODA,
Captain of Police, County of
Kauai, T. H.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [203]

[Title of Circuit Court and Cause.]

ORDER FOR SERVICE OF COPIES OF
AMENDED TEMPORARY RESTRAINING
ORDER, AMENDED TEMPORARY RE-
STRAINING ORDER — OFFICER'S RE-
TURN

Served the within Order for Service of Copies of
Amended Temporary Restraining Order and

Amended Temporary Restraining Order upon Unit 1, Local 149, of the International Longshoremen's and Warehousemen's Union (CIO), therein named as one of the respondents by handing and delivering to and leaving with Joseph Nunes personally, the person found in charge as president of the said Unit 1, Local 149, International Longshoremen's and Warehousemen's Union (CIO), at Lihue, Lihue District, County of Kauai, Territory of Hawaii, a certified copy of the said Order for Service of Copies of Amended Temporary Restraining Order and Amended Temporary Restraining Order, this 23rd day of September, A. D. 1946.

Dated at Lihue, Kauai, T. H., on the 26th day of September, A. D. 1946.

Filed at 3:08 o'clock p.m., September 26, 1946.
/s/ Yukichi Gushiken, Acting File Clerk, Circuit Court, Fifth Circuit, Territory of Hawaii.

/s/ RICHARD I. SAKODA,

Captain of Police, County of
Kauai, T. H.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk Circuit Court, Fifth Circuit, Territory of
Hawaii. [204]

[Title of Circuit Court and Cause.]

ORDER FOR SERVICE OF COPIES OF
AMENDED TEMPORARY RESTRAINING
ORDER, AMENDED TEMPORARY RE-
STRAINING ORDER — OFFICER'S RE-
TURN

Served the within Order for Service of Copies of Amended Temporary Restraining Order and Amended Temporary Restraining Order upon Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), therein named as one of the respondents by handing and delivering to and leaving with William Paia, personally, the person found in charge as president of the said Local 149, International Longshoremen's and Warehousemen's Union (CIO), at Kapaia, Lihue District, County of Kauai, Territory of Hawaii, a certified copy of the said Order for Service of Copies of Amended Temporary Restraining Order and Amended Temporary Restraining Order, this 23rd day of September, A. D. 1946.

Dated at Lihue, Kauai, T. H., on the 26th day of September, A. D. 1946.

Filed at 3:07 o'clock p.m., September 26, 1946.
/s/ Yukichi Gushiken, Acting File Clerk, Circuit Court, Fifth Circuit, Territory of Hawaii.

/s/ RICHARD I. SAKODA,

Captain of Police, County of
Kauai, T. H.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii.

SHERIFF'S RETURN

Served the within named Petition for Injunction and Amended Temporary Restraining Order, on the International Longshoremen's and Warehousemen's Union (CIO), by handing to its representative Mrs. Pauline Rosenthal (Office Manager) a certified copy of same, at the Union's office, Pier 11, South Queen St., Honolulu, T. H., this 24th day of September, 1946.

/s/ LUTHER K. KEKOA,
Deputy Sheriff, City and
County of Honolulu, T. H.

Filed at 3:06 o'clock p.m., September 26, 1946.
/s/ Yukichi Gushiken, Acting File Clerk, Circuit
Court, Fifth Circuit, Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [206]

RADIOGRAM

Sep. 27, 1946.

Confirmation Copy Telephoned to Copy Called
for by.....Time.....Date.....

1 GH 141 Honolulu 26

Honorable Philip L. Rice

Judge of the Circuit Court

Fifth Circuit Court House Lihue

Reference Equity one twenty Lihue Plantation
Company versus International Longshoremen's and
Warehousemen's Union and others in which hear-
ing on the order to show cause why injunction
should not issue was originally scheduled for nine
a.m. September 27th Nineteen Forty-six Richard
Gladstein acting for and in behalf of all respond-
ents therein and Montgomery Winn as attorney for
Petitioner have entered into a stipulation extending
time to answer demur or otherwise plead the peti-
tion filed herein and also extending time for response
on order to show cause and continuing time of
hearing on said order until October seventh, Nine-

teen Forty-six all subject to approval of court stipulations being transmitted to you this date

RICHARD GLADSTEIN,

Attorney for Respondents,

VITOUSEK, PRATT & WINN,

By MONTGOMERY WINN,

Attorneys for Petitioner.

745A

745A

Filed at 8:17 o'clock a.m., September 27, 1946.

/s/ SAMUEL H. KIMURA,

File Clerk Circuit Court, Fifth Circuit, Territory
of Hawaii.

I hereby certify that, exclusive of the printed portion of the Radiogram form on which the original in the file appears, the foregoing is a full, true, and correct copy of the original in the files of the Circuit Court, Fifth Circuit, Territory of Hawaii.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [207]

In the Circuit Court of the Fifth Circuit,
Territory of Hawaii

Eq. No. 120

At Chambers—In Equity

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

STIPULATION AND ORDER EXTENDING
TIME ON ORDER TO SHOW CAUSE

Filed at 11:03 o'clock a.m., September 27, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

Vitousek, Pratt & Winn, Alexander & Baldwin
Bldg., Honolulu, T. H., Attorneys for Petitioner.

Whereas, the Respondents in the above entitled
matter have requested, through their attorney,
Richard Gladstein, and acting in their behalf, that
the time within which the Respondents may respond
to the Order to Show Cause herein be extended to
the 7th day of October, 1946; and that the hearing
on the said Order to Show Cause be continued until
the 7th day of October, 1946; and

Whereas, the Petitioner herein has no objection thereto;

Now Therefore, It Is Hereby Stipulated and Agreed between the Petitioner and the Respondents herein, by their respective attorneys, that with the approval of the Court:

- (1) The time within which the Respondents may respond to the Order to Show Cause in the above entitled matter is extended to the 7th day of October, 1946; and
- (2) The hearing on the Order to Show Cause shall be continued [209] until the 7th day of October, 1946, at the hour of nine o'clock a.m.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO),
LOCAL 149 OF THE INTERNATIONAL
LONGSHOREMEN'S AND WAREHOUSE-
MEN'S UNION (CIO), UNIT 1, LOCAL 149,
OF THE INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S UNION
(CIO), JOSEPH NUNES, DANIEL
RAPOZO, FERNANDO FONTANILLA,
THOMAS TAKEMOTO, SUNAO IWA-
MOTO, WILLIAM PAIA, YOSHIKAZU
MORIMOTO, BENJAMIN IIDA, GEORGE
MASAKI, CHARLES MORITA, RONALD
TOYOFUKU, TAKU AKAMA, JOHN DOE,
MARY DOE, RICHARD ROE, et al.,

By /s/ RICHARD GLADSTEIN,

Attorney for Respondents.

THE LIHUE PLANTATION COMPANY,
LIMITED,

By VITOUSEK, PRATT & WINN,
By /s/ E. C. MOORE,

Attorneys for Petitioner.

Good cause appearing therefore, the above is approved and it is so ordered: provided, however, and upon the condition that the Amended Temporary Restraining Order heretofore issued shall continue in effect until further order of this Court.

[Seal] /s/ PHILIP L. RICE, JUDGE
Judge of the above entitled
Court.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR., CLERK
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [210]

In the Circuit Court of the Fifth Circuit,
Territory of Hawaii

Eq. No. 120

At Chambers—In Equity

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

STIPULATION EXTENDING TIME

Filed at 11:03 o'clock a.m., September 27, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

Vitousek, Pratt & Winn, Alexander & Baldwin
Bldg., Honolulu, T. H., Attorneys for Petitioner.

It Is Hereby Agreed by and between The Lihue
Plantation Company, Limited, the Petitioner herein,
by its attorneys, and the above named Respondents,
by Richard Gladstein acting in their behalf and
as their attorney, that said Respondents may have
to and including the 7th day of October, 1946, within

which to answer, demur or otherwise plead to the Petition filed herein.

Dated: Honolulu, T. H., September 26, 1946.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,

By /s/ RICHARD GLADSTEIN,
Attorney for Respondents.

THE LIHUE PLANTATION COMPANY,
LIMITED,

By VITOUSEK, PRATT & WINN,
By /s/ E. C. MOORE,
Attorneys for Petitioner.

Approved:

/s/ PHILIP L. RICE,
Judge of the above entitled
Court.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [212]

In the Circuit Court of the Fifth Circuit,
Territory of Hawaii

At Chambers—In Equity

In Open Court, Friday, September 27, 1946.

Court Convened at 9:00 a.m.

Present: Honorable Philip L. Rice,
Judge Presiding.

Kenichi Umemoto, Court Reporter,
John Ilalaole, Jr., Courtroom Clerk.

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

Appearance:

Yoshikazu Morimoto, one of the respondents.

The Court read into the record a telegram—filed at 8:17 a.m., September 27, 1946—from Richard Gladstein, attorney for respondents, and Vitousek, Pratt and Winn by Montgomery Winn, attorneys for petitioner.

The Court stated that upon the receipt of the stipulation as mentioned in the telegram the Court will approve same, subject, however, on the condi-

tion that the Amended Temporary Restraining Order continue in effect until the hearing on the order to show cause.

Court recessed at 9:03 a.m. reconvening at 11:30 a.m.

No appearance was noted.

Court stated that the stipulation extending time had been received, approved and filed and that the respondents had up to and including the 7th of October, 1946, within which to answer, demur or otherwise plea to the petition as filed; that the stipulation and order extending time on order to show cause allowing the respondents until October 7, 1946, within which to respond to the order to show cause had also been received, approved and filed upon the condition that the Amended Temporary Restraining Order continue in effect until the further order of the Court. Hearing on order to show cause was set at 9:00 a.m., October 7, 1946.

Court adjourned at 11:35 a.m.

By Order of the Court.

/s/ JOHN ILALAOLE, JR.,
Courtroom Clerk.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [213]

In the Circuit Court of the Fifth Circuit,
Territory of Hawaii

Eq. No. 120

At Chambers—In Equity

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

STIPULATION EXTENDING TIME

Filed at 11:43 o'clock a.m., October 4, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

Vitousek, Pratt & Winn, Alexander & Baldwin
Bldg., Honolulu, T. H., Attorneys for Petitioner.

It Is Hereby Agreed by and between The Lihue
Plantation Company, Limited, the Petitioner herein
by its attorneys, and the above named Respondents,
by Richard Gladstein acting in their behalf and as
their attorney, that said Respondents may have to

and including the 18th day of November, 1946, within which to answer, demur or otherwise plead to the Petition filed herein.

Dated: Honolulu, T. H., October 3, 1946.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

By /s/ RICHARD GLADSTEIN,
Attorney for Respondents.

THE LIHUE PLANTATION COMPANY,
LIMITED,

By VITOUSEK, PRATT & WINN,
By /s/ E. C. MOORE,
Attorneys for Petitioner.

Approved:

/s/ PHILIP L. RICE,
Judge of the above entitled
Court.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [215]

In the Circuit Court of the Fifth Circuit,
Territory of Hawaii

Eq. No. 120

At Chambers—In Equity

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

STIPULATION AND ORDER EXTENDING
TIME ON ORDER TO SHOW CAUSE

Filed at 11:44 o'clock a.m., October 4, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

Vitousek, Pratt & Winn, Alexander & Baldwin
Bldg., Honolulu, T. H., Attorneys for Petitioner.

Whereas, the Respondents in the above entitled
matter have requested, through their attorney,
Richard Gladstein, and acting in their behalf, that
the time within which the Respondents may respond
to the Order to Show Cause herein be extended to
the 18th day of November, 1946; and that the hear-
ing on the said Order to Show Cause be continued
until the 18th day of November, 1946; and

Whereas, the Petitioner herein has no objection
thereto;

Now Therefore, It Is Hereby Stipulated and Agreed between the Petitioner and the Respondents herein, by their respective attorneys, that with the approval of the Court:

- (1) The time within which the Respondents may respond to the Order to Show Cause in the above entitled matter is extended to the 18th day of November, 1946; and
- (2) The hearing on the Order to Show Cause shall be continued until the 18th day of November, 1946, at the hour of nine o'clock a.m.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO),
LOCAL 149 OF THE INTERNATIONAL
LONGSHOREMEN'S AND WAREHOUSE-
MEN'S UNION (CIO), UNIT 1, LOCAL 149,
OF THE INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S UNION
(CIO), JOSEPH NUNES, DANIEL
RAPOZO, FERNANDO FONTANILLA,
THOMAS TAKEMOTO, SUNAO IWA-
MOTO, WILLIAM PAIA, YOSHIKAZU
MORIMOTO, BENJAMIN IIDA, GEORGE
MASAKI, CHARLES MORITA, RONALD
TOYOFUKU, TAKU AKAMA, JOHN DOE,
MARY DOE, RICHARD ROE, et al.,

By /s/ RICHARD GLADSTEIN,
Attorney for Respondents.

THE LIHUE PLANTATION COMPANY,
LIMITED,

By VITOUSEK, PRATT & WINN,
By /s/ E C. MOORE,
Attorneys for Petitioner.

Good cause appearing therefore, the above is approved and it is so ordered, provided, however, and upon the condition that the Amended Temporary Restraining Order heretofore issued shall continue in effect until further order of this Court.

/s/ PHILIP L. RICE,

Judge of the above entitled
Court.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [218]

In the Circuit Court of the Fifth Circuit
Territory of Hawaii

Eq. No. 120

At Chambers—In Equity

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
Respondents.

TRANSCRIPT OF ORAL MOTION ON BE-
HALF OF RESPONDENTS TO DISSOLVE
AND VACATE THE TEMPORARY RE-
STRAINING ORDER, AND ORAL DECISION
AND RULING OF THE COURT ON
SAID MOTION

Filed at 11:48 o'clock a.m. October 19, 1946. (sgd)
Samuel H. Kimura, File Clerk, Circuit Court, Fifth
Circuit, Territory of Hawaii.

Kenichi Umemoto, Lihue, Kauai, T. H., Acting
Court Reporter. [219]

Lihue, Kauai, T. H.

September 20, 1946

Present: Honorable Philip L. Rice,
Circuit Judge Presiding;
John Ilalaole, Jr., Courtroom Clerk;
Kenichi Umemoto, Acting Court Reporter.

Appearances: Montgomery E. Winn, Esq., and Ernest C. Moore, Esq. of Vitousek, Pratt and Winn, attorneys for petitioner; Richard Gladstein, Esq., attorney for respondents; Dudley C. Lewis, Esq., Deputy Attorney General, Territory of Hawaii, *amicus curiae*.

Mr. Gladstein: If the Court please, I want to say first that I want to express my appreciation for the courtesy of the Court in permitting me to make this motion at unusual hours and to thank the Court for the opportunity to do so. I want to say that I would not have asked the Court to extend unduly, as we are here doing, the hours of the court unless there had been great and important reasons for that request.

I appear here, as your Honor has stated, by virtue of the courtesy of the Attorney General of this Territory, the Justices of the Supreme Court and by the courtesy of this Court, for the purpose of presenting on behalf of the respondents in case No. 3948 in equity—120, I am sorry, No. 120—a motion, which I now make, for the Court to vacate and dissolve a temporary restraining order which was issued in this matter on Tuesday of this week, [220] and I make that motion, your Honor, upon three grounds:

The first ground is that, I submit, this Court is bound, as a matter of law, by the provisions of the United States Anti-Injunction Act, popularly known as the Norris-LaGuardia Act, pursuant to which no court of the United States is given the power, any

longer—since 1932—to issue temporary restraining orders *ex parte* in labor disputes affecting the rights of working-men who are on strike and who are engaged in picketing and in other concerted activities for the purpose of prevailing in that strike.

My second ground, your Honor, is that even should you think that, technically, the Norris-LaGuardia Act did not bind you, nevertheless, the principles established in that Act by the Congress of the United States, I submit, should serve as a guide for the Court in this case to accept as a matter of public policy. And I think, here, it will not be denied that the restraining order that was issued in this case was issued *ex parte* without notice to the union and its members and without an opportunity for a hearing, without the taking of testimony of witnesses.

My third ground, your Honor, is that the injunction that has been issued—the restraining order—is so broad, uncertain, ambiguous that we cannot honestly and in fairness understand that which we are prohibited to do from that which we are entitled to do, and that, in the breath of its terms, this restraining order infringes upon rights which the Supreme Court of our country has said are protected by the Constitution of the United States.

(Argument on said motion.)

The Court: The Court, after hearing the argument, feels that nothing has been presented and no sufficient showing made warranting the dissolution of the restraining order as a whole, but the Court

will take under consideration until Monday—this next Monday—the possible modification, in some respects, of the restraining order.

It has been a long, full day for the Court and the Court does not feel that it can, at this time, go into details of possible modification, but, [221] under the rules of practice and procedure, the Court feels that no sufficient showing has been made for the dissolution of the restraining order as a whole. The motion to that effect is overruled.

The Court does, however, give notice that it is taking under consideration, of its own motion, a possible modification of the restraining order.

I Hereby Certify that the foregoing is a correct transcript of my shorthand notes of the oral motion on behalf of respondents to dissolve and vacate the temporary restraining order and the oral decision and ruling of the Court on said motion.

/s/ KENICHI UMEMOTO,
Acting Court Reporter.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth
Circuit, Territory of Hawaii.

In the Circuit Court of the Fifth Circuit
Territory of Hawaii
At Chambers
Equity No. 120

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

PETITION FOR INJUNCTION
AMENDED TEMPORARY RESTRAINING
ORDER—OFFICER'S RETURN

Served the within Amended Temporary Restraining Order on Marcos Arincorayan as John Doe 2 and on Atanasio Lucas Migia as John Doe 4, therein named as two of the respondents by handing and delivering to and leaving with each of them personally, at Kealia, Kawaihau District, County of Kauai, Territory of Hawaii, a certified copy of the said Amended Temporary Restraining Order, this 31st day of October, A. D., 1946.

Dated at Kapaa, Kauai, T. H., this 31st day of October, A. D., 1946.

/s/ HENRY T. SHELDON,

Captain of Police,

County of Kauai, T. H.

Filed at 3:54 o'clock p.m. November 1, 1946,
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii. [223]

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth
Circuit, Territory of Hawaii.

[Title of Circuit Court and Cause.]

AMENDED TEMPORARY RESTRAINING
ORDER—OFFICER'S RETURN

Served the within Amended Temporary Restraining Order on Gregorio Reyes as John Doe 3, therein named as one of the respondents by handing and delivering to and leaving with him personally, at Lihue, Lihue District, County of Kauai, Territory of Hawaii, a certified copy of the said Amended Temporary Restraining Order, this 31st day of October, A. D., 1946.

Dated at Lihue, Kauai, T. H., on the 1st day of November, A. D., 1946.

/s/ JOE S. CARVALHO,
Lieutenant of Police,
County of Kauai, T. H.

Filed at 3:55 o'clock p.m. November 1, 1946.
(s) Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

I hereby certify that the foregoing is a full, true and the correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth
Circuit, Territory of Hawaii.

[Title of Circuit Court and Cause.]

AMENDED TEMPORARY RESTRAINING
ORDER—OFFICER'S RETURN

Served the within Amended Temporary Restraining Order on Kensuke Yamashiro as Richard Roe 1, therein named as one of the respondents by handing and delivering to and leaving with him personally, at Kapaa, Kawaihau District, County of Kauai, Territory of Hawaii, a certified copy of the said Amended Temporary Restraining Order, this 31st day of October, A. D., 1946.

Dated at Kapaa, Kauai, T. H., this 31st day of October, A. D., 1946.

/s/ HENRY T. SHELDON,
Captain of Police,
County of Kauai, T. H.

Filed at 3:56 o'clock p.m. November 1, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth
Circuit, Territory of Hawaii.

[Title of Circuit Court and Cause.]

AMENDED TEMPORARY RESTRAINING
ORDER—OFFICER'S RETURN

Served the within Amended Temporary Restraining Order on Masami Mukai as Richard Roe 2, therein named as one of the respondents by handing and delivering to and leaving with him personally, at Hanamaulu, Lihue District, County of Kauai, Territory of Hawaii, a certified copy of the said Amended Temporary Restraining Order, this 31st day of October, A. D., 1946.

Dated at Lihue, Kauai, T. H., on the 1st day of November, A. D., 1946.

/s/ JOE S. CARVALHO,

Lieutenant of Police,

County of Kauai, T. H.

Filed at 3:57 o'clock p.m. November 1, 1946.
/s/ Samuel H. Kimura, File Clerk, Circuit Court,
Fifth Circuit, Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,

Clerk, Circuit Court, Fifth

Circuit, Territory of Hawaii.

In the Circuit Court of the Fifth Circuit,
Territory of Hawaii

Equity No. 120

At Chambers—In Probate

In Open Court, Monday, November 18, 1946
Court Convened at 9:01 A.M.

Present: Honorable Philip L. Rice,
Judge Presiding;
Kenichi Umemoto, Court Reporter;
John Ilalaole, Jr., Courtroom Clerk.

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

Appearances: A. G. Kaulukou, Esq., County Attorney,
County of Kauai, T. H., Deputy Attorney
General, Territory of Hawaii, amicus curiae.

The Court instructed the Bailiff to call the matter
and to summon all interested parties to court.

The Bailiff called three times and informed the
court of no appearances.

Mr. Kaulukou, County Attorney, appeared on behalf of the Attorney General of the Territory of Hawaii, who acted as amicus curiae, in order that he may notify the office of the attorney General as to the present disposition of the case.

Mr. Kaulukou further apprised the Court that he received a telephone call from one of the respondents, Mr. Shimizu, who inquired whether or no the above matter would be heard on this date and as to whether or no their appearance would be necessary. Mr. Kaulukou replied that he did not know.

Mr. Kaulukou further informed the court that he thought the matter was set for 10:00 a.m. on this date.

The Court stated that the matter was continued to this date by written stipulation and filed in this court which set the matter at 9:00 a.m. on this date.

The Court further stated that a letter was received, dated November 13, 1946, from the firm of Vitousek, Pratt & Winn, on behalf [227] of the petitioner, which the Court read. The letter requested a continuance of the matter and that it be set without day for final disposition at the request of either party involved.

The Court recessed at 9:08 a.m., reconvening at 9:36 a.m.

The Court stated that it was informed by Mr. Morimoto, one of the respondents herein, that At-

torney George Andersen had returned to Honolulu and that there was no one on Kauai to represent the respondents at the hearing set for this date.

The Court ordered that the matter be continued without day, to be set for final disposition at the request of either party involved and that the amended temporary restraining order heretofore issued to continue in effect until the further order of the court.

Court adjourned at 9:40 a.m.

By Order of the Court:

/s/ JOHN ILALAOLE, JR.,
Courtroom Clerk.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above-entitled court and cause.

[Seal] /s/ JOHN ILALAOLE, JR.,
Clerk, Circuit Court, Fifth Circuit, Territory of
Hawaii. [228]

EXHIBIT B

In the Circuit Court of the Fifth Judicial Circuit
Territory of Hawaii

Eq. No. 120

At Chambers—In Equity

THE LIHUE PLANTATION COMPANY,
LIMITED,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
etc.,

Respondents.

PETITION FOR INJUNCTION

Lihue, Kauai, T. H.,
September 17, 1946.

Present: Honorable Philip L. Rice,
Judge Presiding;
John Ilalaole, Jr., Courtroom Clerk;
Kenichi Umemoto, Court Reporter.

Appearances: Ernest C. Moore, Esq., of Vitousek,
Pratt & Winn, Attorneys for Petitioner; A. G.
Kaulukou, Esq., County Attorney, County of
Kauai, and Deputy Attorney General of the
Territory of Hawaii, amicus curiae.

TRANSCRIPT OF EVIDENCE

The Court: The Court will proceed with the
hearing of evidence in support of your petition.

Mr. Moore: I am prepared to submit certain affidavits at this point. If the Court would like to have witnesses I would request a recess or adjournment here with time for me to get them together.

The Court: Do you desire to offer those affidavits in evidence at this time?

Mr. Moore: I do. [230]

The Court: You may offer them and they will be marked petitioner's exhibits from 1 on, consecutively. For the record, please state the name of the affiant, then mark it accordingly, Mr. Clerk. Read off the names of the affiants—or if you will, Mr. Moore.

Mr. Moore: Ronald G. Watt.

The Court: That will be Exhibit 1. These are affidavits.

Mr. Moore: You want his capacity or not at this time, your Honor?

The Court: Pardon me.

Mr. Moore: You want his capacity as an employee?

The Court: Not necessarily.

Mr. Moore: Some of them are not employees but private citizens.

The Court: No, merely the name of the affiant.

Mr. Moore: Keith B. Tester.

The Court: Exhibit 2.

Mr. Moore: Antone Camara.

The Court: Exhibit 3.

Mr. Moore: Hale C. Cheatham.

The Court: Exhibit 4.

Mr. Moore: Wm. A. H. Buddingh.

The Court: Exhibit 5.

Mr. Moore: Norbert Penna.

The Court: Exhibit 6.

Mr. Moore: Courtland E. Ashton.

The Court: Exhibit 7.

Mr. Moore: Leonard T. Cannon.

The Court: Exhibit 8.

Mr. Moore: Alexander G. Hutton.

The Court: Exhibit 9.

Mr. Moore: Harry Nogami.

The Court: Exhibit 10. [231]

Mr. Moore: I have some additional affidavits from some of the same persons, although not marked by separate numbers, on subsequent dates.

The Court: They may be marked by separate numbers.

Mr. Moore: Courtland E. Ashton, again.

The Court: Exhibit 11.

Mr. Moore: William A. H. Buddingh.

The Court: Exhibit 12.

Mr. Moore: Ronald G. Watt.

The Court: Exhibit 13.

Mr. Moore: John S. Carvalho.

The Court: Exhibit 14.

Mr. Moore: Mary Soares.

The Court: Exhibit 15.

Mr. Moore: Georgina Rosa.

The Court: Exhibit 16.

Mr. Moore: Mr. and Mrs. Antone Camara.

The Court: Exhibit 17.

Mr. Moore: Joint affidavit. Charles J. Ferner.

The Court: Exhibit 18.

Mr. Moore: C. E. S. Burns.

The Court: Exhibit 19.

Mr. Moore: John Travasso.

The Court: Exhibit 20.

Mr. Moore: Frank Barretto.

The Court: Exhibit 21.

Mr. Moore: Ira W. Newton.

The Court: Exhibit 22.

Mr. Moore: James P. Langley.

The Court: Exhibit 23.

Those are all the exhibits you care to offer at this time?

Mr. Moore: That is correct. [232]

The Court: They may be received in evidence and marked accordingly.

Mr. Moore: This is for the purpose of the hearing on temporary restraining order and in connection with the order to show cause.

The Court: The Court finds in the files, loosely attached, a motion for temporary restraining order, did you intend filing that?

Mr. Moore: I did, and——

The Court: It has not been marked filed by the clerk.

Mr. Moore: The basis for that was that it is based upon the order to show cause, issuance of that and the motion for temporary restraining order in the interim period. It is assumed—based upon the same, but these will be important on that motion.

The Court: They may be considered in both matters.

Do you purpose offering oral evidence? The Court would be interested in hearing from you whether you feel it is necessary or not.

Mr. Moore: If the Court would be interested in having some of the affiants appear personally, that can be arranged.

The Court: The Court would like to examine some of the affiants.

Mr. Moore: Would you require that all of them come?

The Court: No.

Mr. Moore: A few of them?

The Court: A few of them. You yourself presumably know the ones whose testimony is most relevant and most material to what you seek and the Court will not require cumulative evidence if you can have present some of those who can testify as to the essential facts on which you rely for your injunction proceedings.

Mr. Moore: It will take a little while to get them together.

The Court: Would one o'clock be satisfactory to you? It is now 11:15.

Mr. Moore: 11:15. I do not know the circumstances now existing over here. [233]

The Court: Do you want to take a recess and make inquiry?

Mr. Moore: I would like to do that, yes.

The Court: The Court will take a recess until recalled.

(Court recessed at about 11:15 a.m. and reconvened at 11:35 a.m.)

The Court: You are ready to proceed?

Mr. Moore: I am.

The Court: The Court is in session. You have a witness present you desire to have sworn?

Mr. Moore: I have made arrangements, your Honor, to have the witnesses come over and they are coming over as quickly as we can obtain them. I have obtained a few witnesses now and am ready to proceed with having them testify to exactly what has happened. The first witness will take the stand.

CALEB E. S. BURNS

having been duly sworn, testified as follows:

Direct Examination

By Mr. Moore:

Q. Will you state your name?

A. Caleb E. S. Burns.

Q. Where do you live, Mr. Burns?

A. Lihue, Kauai.

Q. What is your employment?

A. I am general manager of The Lihue Plantation Company, Limited.

Q. Will you state to the Court what you observed on Saturday, commencing Saturday morning, the 14th.

The Court: That is the 14th of this month you are referring to?

Mr. Moore: That is right, September 14th.

(Testimony of Caleb E. S. Burns.)

A. At approximately seven o'clock, Mr. Tester called me by phone and stated that there was a mob of strikers surrounding the entrances of our factory.

Q. Your employees were then on strike?

A. Employees on strike.

Q. Since——

A. Since the first of September. And that they were refusing [234] to let our men, who consisted of supervisory force, to enter through the line into the factory. I immediately proceeded down to the factory and went through the crowd and entered through the back way nearest from my home. I stopped my car and approached the Chief of Police Crowell and asked him what he was going to do. There was a large gathering of men there—oh, four or five hundred men, I would say—who were hooting and calling, making a big disturbance when I entered. The sheriff told me to wait.

The Court: Pardon me for interrupting you. You are mentioning the sheriff. The Court takes judicial notice of the fact that this county has no sheriff. You are referring to the chief of police, are you?

A. I am referring to Chief of Police Crowell. Is it all right if I call him "Chief"?

The Court: Chief—that is correct.

A. The Chief was in a huddle with a group of strikers. At the time I approached him he told me to wait. I waited a while and went back to him again and asked him what he was going to do, and the same reply was to wait. I don't know how many

(Testimony of Caleb E. S. Burns.)

times I approached him, but I approached him several times. Finally, I went to him and said that we would like to have the entrances to our factory grounds opened up, so that our employees could enter. He again said, "Wait." Mr. Tester was with me when I approached him at the time. Shortly after that, Chief Crowell came over to me and, in the presence of Mr. Tester and Mr. Smith, said that the union leaders were willing to let the manager, assistant manager, Mr. Watt and possibly Rockwell Smith enter, and would that be all right. My reply to the chief was that we wanted the road opened so that anyone having business in our factory might enter. This was approximately—as a matter of fact I think it was 7:55 in the morning.

Q. In other words your impression of the conversation was that [235] they were limiting who could and who could not enter the plant as far as they were concerned.

A. That was definitely so according to Chief Crowell's statement to me. I then went back to where our group of employees were standing and told them that they had better go home and get their breakfast. I proceeded to do likewise. On the way home, thinking the situation over, I decided it would probably be better to go back and tell our boys, employees, to go home and therefore take off some of the tension from the situation. I turned around and went back and went over to Chief Crowell and, in the presence of Charlie Fern, who was standing there, told him what I planned to do.

(Testimony of Caleb E. S. Burns.)

He approved of the action and I went and told the few men that were still there to return home and stay there until the road was opened. When I talked to the chief I told him that we were still expecting him to open that road.

I have left out one little fact that you might want to hear; that because of the temper shown by the mob I thought it would be wise to have Mr. Charlie Rice, Chairman of the Police Commission, see what was going on. I attempted to reach him by telephone but was unable to do so and I went back and told the chief what I was trying to do and recommend that he dismiss an officer so that Mr. Rice might be brought into the scene. I then went to my office to telephone to Honolulu but was unable to get anybody at that time of the morning. But I told Mr. Townsley that I was looking for Mr. Charlie Rice and he said that he had just left the post office, so I telephoned to his house or had Mr. Townsley telephone to his house. He found Mr. Rice there and I talked to Mr. Rice and told him the situation. He immediately came up to the factory and spoke to Chief Crowell. I also called Mr. McKeever, who is a member of the Police Commission, for the same reason and he shortly after that came down to see me. I think that covers largely what happened that morning. [236]

Q. Do you know, Mr. Burns, whether any employees were able to gain access to the mill that evening?

(Testimony of Caleb E. S. Burns.)

A. No, not to my knowledge. Nobody entered the mill.

Q. You have valuable equipment throughout the mill? A. Yes.

Q. You have utility equipment also?

A. Yes, sir.

Q. Through which you control the utilities in this area? A. We have——

Q. Will you explain that to the Court?

A. We have two hydro power stations up in the mountains, who are, who, which supply the current when the mill is not operating, which is the case on this date. The load on the hydro stations sometimes reaches a point beyond which the hydro stations can supply sufficient power. At this particular time and for several days the power load was just about what the hydro stations could supply. Whenever we reach this situation something has to be done and usually our load at this time of the year—maximum load—comes on about 6 o'clock, between 6 and 7 o'clock in the evening. If that load is more than the power produced by the hydro stations, then it has been customary for Mr. Cheatham, who is our head electrician in charge of power, to cut off some of the lines, and the only way that can be done is through the switchboard which is in the factory. In other words, we always have somebody on duty in the power house in the factory, whether the factory is running or not, in order to take care of any condition which might make it necessary to change, shut off some of the lines. This we have not

(Testimony of Caleb E. S. Burns.)

been able to do, was not able to do on that day, because no one was allowed to enter the factory.

This utility supplies the community, including hospitals and other essential facilities?

A. Yes, sir. [237]

Q. That condition continued—did it continue on Monday, September 16?

A. The condition was exactly the same on Monday. We were fortunate in having the rains in the mountains which made it possible to generate enough power by the hydros carrying full load—utility load.

Q. In other words, the condition continued so that on Monday personnel were denied access to the mill?

A. That is right. They were not allowed to go into the mill. I have not been allowed to enter the mill at any time since I went in the yard early Saturday morning.

Q. Going back to Saturday, Mr. Burns, concerning the attitude of the men, large numbers—they were milling around, were they?

A. Yes, gathered in mobs in front of the road, the road entering the mill; also, over the warehouse side.

Q. And much shouting?

A. Much shouting.

Q. Very boisterous? A. Very boisterous.

Q. Were there as to you personally any threats or were you in any way intimidated?

A. Only to this extent, that when I approached the crowd in the automobile I approached very

(Testimony of Caleb E. S. Burns.)

slowly, in low gear, and they were very reluctant to separate. As a matter of fact they crowded right up to the car, in front of the car and the sides of the car. There was hooting, yelling and I think the statements were made, "Turn him over. Turn him over. Stop him," stuff of that kind. They had previously, I was told——

The Court: Please don't mention what you were told. That would be mere hearsay.

A. All right. Well, that is as far as I'll go.

Q. The attitude of the mob, in other words by numbers and shouting, etc.

A. I would like to make one other statement here. When I got [238] out of the car, I suppose in my excitement when I went over to speak to the sheriff, I left the key in the car and when the sheriff told me to wait the first thing I thought of was to go and get my key, which I did, but on the way going through the crowd I was bumped, shouldered by one man. I wasn't hurt, nothing serious, but it showed the temper of the crowd; that they were ready to do almost anything provided there was an opportunity.

Q. Have there been any further developments this morning with reference to strikers in your plant?

A. You are referring to the factory?

Q. Or any other premises.

A. This morning, as has been my custom for many years, I attempted to go into the factory yard, went down and turned in and a group of men

(Testimony of Caleb E. S. Burns.)

immediately swarmed out in front of me. I stopped, turned around and came to the office. At the office there was a large group of men surrounding the office up on the veranda, also in the back of the office, also on the road which leads to the garage where I park my car. I turned in there as usual. The crowd in front of me on the road made it necessary for me to stop and go in low gear, but I proceeded to go through and went into the garage. That mob was hooting, making a lot of noise, a lot of disturbance. When I got into the office, Mr. Townsley was there, Mr. Wedemeyer was there, I believe, Henderson was there, and Joe Vierra was there. All other employees of the office were not there. Several employees had attempted to get into the office and were stopped. They later telephoned to Mr. Townsley and told him they couldn't get in. He told them to stay home.

Every time any of our employees went along the highway, the main road, which I saw Mr. Ashton do in his car—he went to the [239] post office, parked his car alongside the road. The minute he showed up they started to hoot and yell, which they did every time any of our employees who are not on strike appear.

Q. In your opinion, the situation this morning at the office was not too dissimilar from the situation at the mill. In other words, they were attempting to control who they would decide to let in and attempting to intimidate all persons trying to get in.

A. The only difference was that at the mill they

(Testimony of Caleb E. S. Burns.)

let no one in and then after the chief had talked to them for hours, as I previously stated, he said that the manager, assistant manager, Mr. Watt and possibly Mr. Smith might go in. The back of the office episode this morning they made no attempt, no real attempt, to stop me, except a lot of men were at the entrance of the garage. They made no attempt to stop Mr. Townsley, or Mr. Tester, Mr. Wedemeyer, Mr. Henderson, Mr. Smith, but they did stop others. In other words, it was very evident that they were letting into the office those that they chose to let in.

Q. Did you witness their stopping others?

A. What was that question?

Q. Did you witness their stopping others trying to get in?

A. No, I did not. I did not see them stop the others. Mr. Townsley told me that they had and further that those men that they attempted to stop had telephoned to him that they were unable to get in and wanted to know what they should do.

Q. He ordinarily reports to you?

A. He would in this case, because I was anxious to know who were working and who were not working.

The Court: Please state for the record the position that Mr. Townsley holds in the office.

A. Mr. Townsley is our office manager. He is office manager of The Lihue Plantation Company, Limited.

(Testimony of Caleb E. S. Burns.)

Q. Mr. Burns, from these past incidents and occurrences which [240] have continued, is it your opinion as manager of the plantation that you are being deprived of your property in the way that you would attempt to operate it either under normal circumstances or even under these conditions?

A. Absolutely. We have called the Chief of Police several times. We called the Chief of Police this morning. Mr. Townsley called him in my presence and told him that there was a mob in front of our office, that they were on the veranda of the office making a great disturbance and wouldn't let certain people in and we would like to have the mob removed. His reply to Mr. Townsley was that—I was on the line so I heard it—was that the County Attorney had instructed him not to break a picket line and until he received other instructions he could not do so. I feel that the law is not being enforced. I should say the laws are not being enforced, not knowing the laws myself too well. We certainly have rights.

Q. In your opinion, in judging from your personal experiences with this, you believe that there is no indication it will not continue; it will probably continue?

A. I think it will get worse; as soon as the mob learns that the police will not enforce the law, why, naturally they will go to a greater extent. If the law had been enforced at the mill we wouldn't have had the mob at the office.

(Testimony of Caleb E. S. Burns.)

Mr. Moore: I believe that is all I have, your Honor, unless you care to ask some questions yourself.

Q. (By the Court): Relative to the episode at the mill, that was on Saturday, the 14th instant, was it? A. Yes, sir.

Q. Were the persons constituting what you refer to as a mob on the public highway or on plantation property?

A. I would say that at least—well, I think all practically were on plantation property. Our road joins into the main highway [241] and they were all on the mill side of the highway, which would be——

Q. That is where your plantation road joins the main highway near the new viaduct?

A. That is right.

Q. How many entrances are there—plantation entrances or roads—into the mill or factory?

A. There are three entrances.

Q. Did you go to the other entrances after being blocked at this first entrance?

A. I came in the back entrance, which is one entrance off the main highway just after you cross the bridge over the railroad tracks. I entered that entrance and went out the what we call the main entrance to the factory which is on the old road where the greater mob——

Q. The old road between the Lihue Store corner and the Lihue Schoolhouse corner?

A. Right. Then I went over also to the other entrance which is the entrance beyond our ware-

(Testimony of Caleb E. S. Burns.)

house which goes to the blacksmith shop. That also had a group of men guarding it—group of strikers guarding it—preventing us from going in.

Q. Were they in such a position that they blocked your right of way? A. Absolutely.

Q. All of them, in each instance?

A. In each instance. The picket line on the back entrance where I entered the grounds probably did not consist of more than ten men and they were not in the middle of the road. That is why I went in there. I turned and went in there before they could get across the road to stop me. It is very evident that they would have attempted to stop me had they had time. I was traveling right along because there was nobody in front of me. The other entrance where I went out was a mass of people and it was necessary for me to put the car in low gear and just force my way through. [242]

Q. In each instance the men were on the plantation property, were they? A. Yes, sir.

Q. This instance of this morning that you refer to about the men being at the plantation office, were they invited there by you or anyone?

A. They were not invited there by——

Q. Any plantation authority.

A. ——any plantation authority, no.

Q. Did you ask thm to leave?

A. I did not ask them to leave. We did ask the Chief of Police to remove them.

The Court: That is all.

Mr. Moore: I have another witness outside.

I have my second witness here, your Honor.

COURTLAND E. ASHTON

having been duly sworn, testified as follows:

Direct Examination

By Mr. Moore:

Q. Will you please give the Court your name?

A. Courtland E. Ashton.

Q. Where do you live?

A. In Lihue, Hawaii.

Q. Are you employed where?

A. At the Lihue Mill.

Q. In what capacity?

A. As head sugar boiler.

Q. How long have you been working for the company, Mr. Ashton?

A. Since March, 1945.

Q. The employees of the company and those under you are now out on strike?

A. They are.

Q. Since what time?

A. Since the first of September. [243]

Q. They have not been reporting regularly for work?

A. They have not been reporting at all.

Q. Will you please tell the Court in your own words keeping it as briefly as possible what you witnessed personally on Saturday, September 14th.

A. I arrived at the main entrance to the mill yard at about 6:15.

Q. Is that your usual time?

(Testimony of Courtland E. Ashton.)

A. That is my usual time. We begin work at 6:30 and I usually arrive there about 6:15.

Q. You were proceeding to work in the mill at that time?

A. I was proceeding to work and when I arrived there I found the main entrance to the mill yard jammed with cars and many men, some of whom were employees of the mill. I saw Mr. Cheatham's car there—head electrician. I saw the carpenter's car there which Mr. Prueser had been driving, and I would estimate about two hundred and fifty men were flocked around there, around that entrance and also the other entrance which is by the warehouse. As soon as I got out of the car they all began to shout and they were shouting, "We want Ashton." I asked Tom Watt if I may go through. He said, "No, you had better wait a while." I saw two policemen standing there, so I went over and asked the policemen if this road should not be opened and they said they did not know, they had to wait until the chief arrived, so I remained there and the chief did arrive. Later on Mr. Burns arrived and came in the side entrance. He got through the side entrance and he came on through where we were. Nothing else of importance happened. I simply stayed around there. The men were milling around at all times.

Q. You saw no one get in the mill during the time that you were there?

A. No, I didn't see anyone enter the mill.

Q. What was the attitude of the mob that you refer to?

(Testimony of Courtland E. Ashton.)

A. They were calling everyone by name and shouting around there at every one, Mr. Burns included, and they were a truculent [244] mob and it was quite apparent anyone entering there would immediately be beaten. We were challenged to try to go through.

Q. You were also trying to go to work on Monday?

A. Yes, I tried to go. At eleven o'clock on Monday I went down to that same main entrance of the mill yard.

Q. That was September 16th?

A. That's on Monday, September 16th, that's Monday; that was at 11 o'clock. The men crowded out on to the road again and blocked my entrance. I made no attempt to go through. I backed away and went over to the warehouse entrance and tried again. Again they flocked into the entrance and blocked my way, so I backed away from there and tried to go through the side entrance and found a wire across the road there and boxes and barricades, and they also prevented my entrance.

Q. On Monday, the 16th, now, in preventing you from entering, were they on plantation property?

A. Yes.

Q. All of them at all three entrances?

A. They were all on plantation property. As I understand it, that is plantation property as soon as you get off the County road and they were at the entrance.

(Testimony of Courtland E. Ashton.)

Q. They were definitely blocking all entrances to the property?

A. They were blocking all entrances.

Mr. Moore: That is all I have, your Honor.

Q. (By the Court): They were all off the highway then?

A. They were off the highway.

Q. The public highway?

A. They were off the public highway and on the road leading to the mill.

Q. Leading to the mill. Did they indicate by their attitude that they would act violently toward you if you proceeded? [245]

A. They stood directly in front of the car.

Q. And absolutely prevented you from going forward?

A. It would have been impossible for me to go forward without striking one of the men.

The Court: That is all.

MARY SOARES

having been duly sworn, testified as follows:

Direct Examination

By Mr. Moore:

Q. Will you please state your name?

A. Mary Soares.

Q. Where do you live?

A. At Lihue, Lihue camp, plantation camp.

Q. Lihue Plantation camp? A. Yes.

Q. You are a housewife?

A. Yes, I am.

(Testimony of Mary Soares.)

Q. What does your husband do?

A. He is a welding foreman.

Q. This house in which you live is plantation house?

A. Yes, it is.

Q. How long have you lived in this house?

A. About four years now.

Q. Four years. You have any children?

A. Yes, two children.

Q. What are their ages?

A. One is five and one is four. One is five and one is one.

The Court: Will you please speak a little louder?

Q. One is five and one is one?

A. Yes.

Q. Your husband is working now as he has in the past?

A. He has in the past, but at present he is not.

Q. He is not working at present. He is a welding foreman, you say?

A. Yes, he is. [246]

Q. He is not a member of the union?

A. No, he isn't.

Q. Has he been approached by any group to join the union?

A. Yes, he has.

Q. Have they also attempted to interfere with his going to work?

A. Well, not that I know of.

Q. Have they approached him at your home at any time?

A. Yes, when they came over to picket at my house.

(Testimony of Mary Soares.)

Q. They picketed your house? When did that occur?

A. I think that was on a Thursday, if I am not mistaken. Last week anyway.

Q. Will you tell the Court exactly what happened on that day?

A. About eight o'clock in the morning a group of men came down the road, yelling, about twenty-five or thirty men anyway. They just yelled and came up to the house and said, "Is this a scab's house?" And somebody in the crowd answered, "Yes, this is a scab's house." They just hang around and kept yelling and I just went about my work and I had my little girl out in the yard playing and they would call her and say, "Your daddy is a scab." When I went to empty my waste basket in the waste barrel which is out on the road, back road, one of the men came up to me and said, "To think you live in a scab's house." He said, "if I were you I'd run away." And someone else on the side shouted, "What do you mean run away. I'd kill myself." So I just came back and as I was walking in the house someone in front yelled, "Yes, call him a scab, that son of a bitch." After that they just hung around awhile and they didn't bother me any more. That is about all. They left sometime in the afternoon.

Q. You say they were around back of the house also?

A. Yes.

Q. Is that your property back there, I mean as part of your house property?

(Testimony of Mary Soares.)

A. But they were on the road; they weren't in the yard. [247]

Q. That is a plantation road? A. Yes.

Q. And they were along the edge of your——

A. Of the back yard.

Q. Back of your house where you are now living? A. Yes.

The Court: About how many men were there?

A. About twenty-five or thirty men.

Mr. Moore: That is all I have.

The Court: So far, I call your attention to the fact, Mr. Moore, that no one of the respondents has been identified by any of the witnesses?

Mr. Moore: By name?

The Court: By name.

Q. You know that these picketers, as you refer to them—did you know any of them at all, personally?

A. Just the one that swore at my husband.

Q. The one that swore at your husband?

A. Yes.

Q. You know his name?

A. George Miyasaki or something.

Q. Masaki? A. Yes.

Q. You don't know, do you, whether the others—you knew that they were employees?

A. Yes, I do—all employees.

Q. All employees. Were they members of the union, do you know?

A. I am pretty sure they were.

Q. They seemed to be?

A. They seemed to be. [248]

GEORGINA ROSA

having been duly sworn, testified as follows:

Direct Examination

By Mr. Moore:

Q. Will you state your name?

A. Georgina Rosa.

Q. Will you speak up a little louder so they can hear you?

A. Georgina Rosa.

Q. Where do you live? A. Lihue.

Q. Lihue?

A. In front of the theatre, by Dr. Wallis.

Q. What is the name of that road?

A. Just the main road.

Q. The main road down here, the road to Kapaa?

A. Yes.

Q. You are a housewife? A. Yes.

Q. Your husband is employed? A. Yes.

Q. Where? A. Lihue Plantation.

Q. What is his work?

A. He works in the mill—mill engineer.

Q. Mill engineer? A. Yes.

Q. How long have you been living in this house that you are now living in?

A. Oh, about two years.

Q. Two years. It is a plantation house?

A. Yes.

Q. Has your husband been approached to join the union at any time?

A. Yes, they came over and told him to join, but he wouldn't join. [249]

(Testimony of Georgina Rosa.)

Q. Have they taken any further action by way of threats or intimidation to get him to join?

A. They just called him up. They telephoned over to my place at 5:11, five after eleven and they called him but I said he was sleeping.

Q. Have they attempted in any other way to come around the house?

A. They told me that how I like the crowd outside.

Q. A crowd? A. Yes.

Q. There was a crowd outside at that time?

A. That is right, on the Tuesday morning.

Q. Tuesday morning?

A. There was a crowd.

Q. Do you recall the date that would be?

The Court: Was that last week?

A. Last week.

Q. (By Mr. Moore): Tuesday, the 11th, that would be?

A. Yes; then on the 12th they came again.

Q. They came again on the 12th? A. Yes.

Q. How many came?

A. Oh, about hundred something boys in front and back.

Q. In front and back of the house?

A. Yes.

Q. You have a plantation road in back?

A. No. It is a plantation road in the back.

Q. Back of the house. What did the pickets do? You just tell the Court what——

(Testimony of Georgina Rosa.)

A. They just yelled at me, "Scab," calling me scab. "There is a scab in the house; all scabs in the house." And then when I [250] come out they go out and when they relieve themselves they all yell at me and say, "Hey, you scab!" And they out in the road relieving by themselves.

Q. How long were they around?

A. From morning till afternoon.

Q. Did you recognize any of them?

A. No, I don't know.

Q. But they were employees? A. Yes.

Q. You think they were are all members of the union? A. Yes.

Q. The way they talked? A. Yes.

Q. Were you at all frightened?

A. Yes, I was frightened to death. My baby, too, and my auntie.

Q. You have a baby? A. Yes.

Q. How old? A. Two years old.

Q. And your auntie, you say?

A. My auntie from Honolulu. She is going to leave on Sunday. She was at my place all frightened; she was just trembling.

Q. Did they shout and holler quite a bit?

A. Yes, they shouted. Every time when I come out they shout, "Hey, you scab! Get in the house. You are living with a scab. Not ashamed living with a scab?" Then my little children come from school they just sit down there. They won't give room. They just creep to the steps to come in and out. My little boy is seven years and the little girl

(Testimony of Georgina Rosa.)

is twelve and other one is fifteen. They just yell at them, "You scabs! Get in the house. You scabs!"

Q. Did you call the police at all?

A. Yes, I called the police. [251]

Q. What happened then?

A. My auntie was on the porch and I was in the parlor by the window and there was a boy that threw a paper in the yard and then I called the policeman, and I told the policeman if they could throw paper in the yard and he said no. So I said there is a boy that threw a paper in the yard. The policeman just came out and he said, "Where is the paper?" I showed him where was the paper and he just picked it up, and all the union men all came altogether on the road. The policeman was talking to them and the boy was talking to the policeman. I don't know what they said. Then the policeman took the paper and put the paper in the pocket and went away.

Q. Did that police try to break up the picket?

A. No, he just went in the car. When the policeman came down on the road they all yelled, "Hey, you scab, you boto boto," calling me names. Why I call the policeman, for nothing?

Q. After you called the police they called you names for calling the police? A. Yes.

Q. They did?

A. They called me names, "boto boto," their language, and they told me, "Get in the house; we come again tomorrow."

(Testimony of Georgina Rosa.)

Q. They told you to get in the house?

A. Yes.

Q. How long did that go on?

A. From the morning from seven until 3:30.

Q. From 7 until 3:30? A. Yes.

Q. How many—what did you say the numbers were? A. About hundred something.

Q. They kept that up all day long?

A. Yes, all day, front and the back.

Mr. Moore: I believe that is all, your Honor.

The Court: That is all. [252]

WILLIAM A. H. BUDDINGH

having been duly sworn, testified as follows:

Direct Examination

By Mr. Moore:

Q. Will you state your name to the Court?

A. William A. H. Buddingh.

Q. Where do you live?

A. I live in Lihue.

Q. You are employed?

A. I am employed by the Lihue Plantation.

Q. In what capacity?

A. Chief engineer.

Q. That is, chief engineer at the mill?

A. At the mill, that is right.

Q. You have been trying to go—you have been seeking to work recently, the last few days?

A. Not the last few days, not since Saturday morning.

Q. Not since Saturday morning?

(Testimony of William A. H. Buddingh.)

A. Since Saturday morning I have not been able to get into the mill.

Q. You were not able to get into the mill Saturday morning? A. No.

Q. Will you please tell the Court, briefly, just what you witnessed?

A. I arrived at the mill early Saturday, because I was notified that mass picketing was going to occur at the mill. At four o'clock in the morning I arrived at the mill and there was no picketing of any extent being done at that time. I went outside the mill and went into the garage and was talking to Mr. Tester and Mr. Langley and Joe Travasso, together with the two watchmen who were on shift at the mill. After a while, while we were talking, a mass of pickets formed a line from the garage to the warehouse; after which I talked to Tony Camara, who was one of the watchmen, for us to go inside and see how the other side of the mill was getting along. Well, I never got inside because I was stopped [253] by a solid line of pickets, say, anyways from five to six deep, maybe more, five to six deep, shoulder to shoulder, barring my way to the factory.

Q. Did you recognize any of them?

A. I did not recognize very many of them. Most of them were off plantation men as far as I can determine.

Q. Some of them were employees?

A. Some of them were employees, definitely, but the men who actually tried to stop me I did not recognize as plantation men.

(Testimony of William A. H. Buddingh.)

Q. Known to you as union men?

A. Known to me as union men because all wear their badges.

Q. All were wearing their badges?

A. All were wearing their badges.

Q. What badges? A. CIO.

Q. CIO? A. That is right.

Q. ILWU?

A. ILWU. Some of them are white, some of them are orange.

Q. Did they threaten you?

A. They did not threaten me, because they just told me I could not get through. I asked them to get through. I even made the statement, "Come on, boys, sorry because you can't stop us out here." I was very much booed about the statement, "Come on, boys." "Now you call us boys, other times you threaten us."

Q. Did you attempt to get through?

A. I attempted to get through on two different occasions.

Q. What happened? A. I was stopped.

Q. How were you stopped?

A. By the shoulder movement.

Q. Shoulder movement?

A. Shoulder movement. The men were line in line and I was walking [254] into the line with my arms crossed in front of me, trying to push myself through, but I was not able to get through.

Q. Pushed back? A. Pushed back.

(Testimony of William A. H. Buddingh.)

Q. From that, your conclusion was that neither you nor anyone else was going to get into the mill; that was the attitude——

A. That was the attitude I definitely got.

Q. This attempt to get through and in which you failed because of the force used against you on that, was that on plantation property?

A. It was on plantation property, yes. The line was on plantation property. As a matter of fact we were on plantation property before we proceeded into the line, but it was outside the line.

Q. Did you see any so-called union representatives around at any time? A. Not until later.

Q. Who did you see?

A. I saw Morimoto and George Masaki and William Paia.

Q. William Paia? A. William Paia.

The Court: What was the first name you mentioned?

Mr. Moore: Morimoto.

A. Morimoto.

Q. The picketing continued after they arrived?

A. Picketing continued, yes.

Q. They did not—in other words, it did not change at that time?

A. No, it didn't, the pickets remained all the time.

Q. Still preventing access to the mill?

A. Still preventing access to the mill, because each time we would try to walk toward the other entrance, the whole mob would follow us and much booing and catcalling, and so forth and so on, occurred during that period [255]

(Testimony of William A. H. Buddingh.)

Q. Did you attempt to get into the mill on Monday?

A. On Monday, yesterday, I attempted to get into the mill at around 11 o'clock. I drove my car right up to the picket line and was stopped at the south gate, that is, the main entrance of the mill. About 15 to 20 pickets refused me entrance to the mill. After which I went to the warehouse entrance and was again refused. As a matter of fact, one of the pickets put a "Respect the Picket Line" sign right in front of the car which I would have either had to run over or break down if I proceeded.

The Court: By what was that?

A. Picket sign reading, "Respect the Picket Line." After that we went to the side entrance of the mill near the main road where Olin Parias lives and tried to get through again. We found—I say "We" because Courtland Ashton was following me with his car. Two cars were going down that way. Personally, I found this road blocked by a wire strung across the road and benches placed underneath the wire, refusing us entrance. One of the boys who had refused us at the main entrance of the mill was Karimoto, who is employed in the factory at the sugar warehouse, refused entry at the main gate and also he went through the mill site to the other entrances and stopped us again.

Mr. Moore: That is all, your Honor.

The Court: It was Takemoto, you said?

A. Karimoto.

The Court: No questions.

JAMES P. LANGLEY

having been duly sworn, testified as follows:

Direct Examination

By Mr. Moore:

Q. Will you please state your name?

A. James P. Langley.

Q. Where do you reside?

A. I live at Lihue.

Q. Lihue. You are employed?

A. Employed as division overseer for The Lihue Plantation Company, Limited. [256]

Q. You have been working?

A. I have been working here since 1931.

Q. In the last few weeks you have been at work?

A. Yes.

Q. Every day? A. Every day.

Q. Have you any others working with you, as division overseer?

A. No, I am the only division overseer on this side.

Q. You are? A. Yes.

Q. The employees are out on strike?

A. The employees are out on strike.

Q. You have—in other words, your lunas have no men working for them?

A. No men working for them. The men that were working signed up with the union.

Q. Will you tell the Court, Mr. Langley, what efforts you have made to perform your work and what has developed with reference to that in the last few weeks? Just briefly without getting too deep into it? A. Yes.

(Testimony of James P. Langley.)

Q. You don't need to specify dates unless you recall them specifically.

A. Yes. The first trouble that came to my attention was on September 2d. Mr. Burns, manager of the Lihue Plantation Company, stopped by my house in the morning and told me that water was overflowing on the road below one of my fields, so I went up there right away and checked for myself and, sure enough, below Lihue Field 3-A on the road there was covered with water. Then I investigated the water gates and found that several of the water gates had been tampered with—off the main ditch—the water going into the field and then overflowing from the field onto [257] the road. I adjusted these gates and put them back in order and returned home. Then, on resuming work with the lunas on the third, I told my makai section luna, Joe Amaral, that water coming through the mill and goes down to the makai field should be thrown into the field rather than be wasted. This was done. Then, on one of those day that week one of my section water foremen, Augustin Lomigkit, reported to me that a car had driven down in the morning—occupants, one of Japanese ancestry and three or four Filipinos—told them that the water shouldn't be thrown into the cane. Then that same afternoon Joe Amaral told me that someone had visited his house the previous evening and advised him not to put water on the cane. He acted accordingly.

Q. You know who visited his house; did he tell you? A. He did not.

(Testimony of James P. Langley.)

Q. It was a threat to him not to turn water in the——

A. It seemed to be that, yes.

Q. Did he identify them as union men?

A. It must have been strikers.

Q. Did he tell you that?

The Court: The Court will rule that out. It would be hearsay anyway.

Q. Proceed with your story.

A. This Joe Amaral, he acted accordingly and he himself said that and that he would not throw any more water himself. Then on the morning of the fifth, I myself went down to Lihue Field 35-B and dropped in a water gate there. You might say this water was coming from the overflow of what's known as our Field 20 Reservoir. I put this water in so it wouldn't be wasted. That morning, about 9:30, one of my irrigation foremen, H. Kagehiro by name, reported to me that while he was on his horse coming along the railroad track he had seen a car stop there, but he was at such distance that he couldn't recognize [258] the parties. The water gate was taken out. This he said he didn't see himself being taken out, but reported to me it was taken out. So I went down there myself and checked and found that the water gate had been taken out. I searched around, but couldn't see the—find the gate, so I reported these incidents to our manager, Mr. Burns, and Mr. Tester, assistant manager.

Q. In other words, throughout those days your efforts to water the fields to the extent that you attempted to were interfered with?

A. Yes.

(Testimony of James P. Langley.)

Q. Did they—did any of the union men approach you at any time concerning the irrigation, either personally at your home or otherwise?

A. None of them did approach me, personally.

Q. Was your house picketed in any way?

A. My house was picketed on Saturday of September 7th. I came home for breakfast and I got into the house. Since I went in the front room I noticed in front of my yard beyond the hedge a group of men, which I realized instantly that I was being picketed. I stayed within the house awhile, then went out in the yard and while I was out in the yard they yelled, "Langley, scab. Go to your fields. Go hanawai. Come out." After an hour or so at home, I did drive out of my yard. They didn't stop my passage, but they moved toward me and catcalled me.

Q. Did you recognize any of them?

A. I did.

Q. Were they wearing union badges?

A. I believe so, which ones I couldn't say.

Q. You recognized them as employees, some of them?

A. I did.

Q. Are they in the union, you presume?

A. Yes.

Q. Were you otherwise threatened or any other intimidation?

A. Yes. [259]

Q. Without explaining in too great detail, when did that occur?

A. That occurred that same day in the afternoon when I left my home after lunch. I drove

(Testimony of James P. Langley.)

down the hill towards the post office and as I drove down I was followed by another car and I realized that I was being followed. I turned into the post office and went over to the plantation office outside on the veranda and talked with Mr. Baldwin, the division overseer of Hanamaulu. I remarked to him that that bunch is following me.

Q. Did you recognize any of them?

A. I did.

Q. Who were they?

A. The one who was driving the car was John Leonard Costa.

Q. An employee?

A. He is an employee of the Lihue Plantation Company. And there were two Filipinos.

Q. Two Filipinos? A. Yes.

Q. Did you notice whether they had union badges?

A. I believe one of the Filipinos had a union badge.

Q. Are they otherwise known to you as members of the union? A. Yes.

Q. They followed you for some distance?

A. Then I came out, went back to my car and drove into Mr. Seaton's yard and went in and had a talk with him for a few minutes. While I was in there they drove on out in the back here, across from the—near the tennis court. Then I came out of Mr. Seaton's house with him and went up to my house again and they followed on behind us and I was in my house for a few minutes and we came out

(Testimony of James P. Langley.)

again. We were followed on down. I came to the office and reported the incident to Mr. Tester, assistant manager, Lihue Plantation Company. I parked in the back of the office. While I was parked there, they stopped [260] their car there, on this side of the tennis court. Then we drove out onto the highway with Mr. Seaton and Mr. Tester. I drove down by the overpass here, just below the hotel, and turned into one of my or our plantation roads, drove a little distance in and this car followed inside and when he was well inside we stopped. Mr. Goodale Moir's car behind this Suki—as I call him—Costa, but his common name is John Leonard Costa. I stayed in my car and Mr. Tester went back and questioned these parties. Then Mr. Tester went and called the police and police came. I remained in my car and then came out and passed this car with Costa and the two Filipinos and went over toward where the officers and Mr. Tester were. Then I took my car and drove on. We turned around and returned with the police to the headquarters. I didn't hear anything what happened after that incident.

Q. From all that happened on that, you have every indication to believe that it will continue, such attempts to interfere with your work?

A. I believe so.

Q. So that, in effect, you cannot do much in the fields? A. That is what I feel.

Q. Have many of the men working under you been intimidated to the point where they will not work or they do not come to work at all?

(Testimony of James P. Langley.)

A. The supervisors have—many of them have joined the union.

Q. They are not coming to work?

A. They are not coming to work.

Mr. Moore: That is all I have, your Honor.

The Court: That is all; no questions.

LEONARD T. CANNON

having been duly sworn, testified as follows:

Direct Examination

By Mr. Moore:

Q. Will you state your name?

A. Leonard T. Cannon. [261]

Q. You reside here? A. In Lihue.

Q. You are employed?

A. By the Lihue Plantation Store.

Q. In what capacity?

A. Assistant manager.

Q. Your employees, the ones working under you, are out on strike? A. They are.

Q. Strike called by the ILWU, so far as you know? A. So far as I know, yes.

Q. Has the store been operating?

A. In a very limited way. I personally have been selling to six accounts perishable merchandise only. Six accounts are four local restaurants and the two hospitals.

Q. Has the store been—have you been prevented from opening the store? A. Yes, we have.

(Testimony of Leonard T. Cannon.)

Q. In what way has that occurred?

A. Mass picketing at all of our front doors and at the road leading from the main road to our back entrance. I believe the only ones permitted in have been the six that we are still attempting to serve.

Q. That is by enforcement of the union and picketers?

A. Yes. The roads are blocked and no one has been permitted to come behind the store with the exception of the six. And today a man from Wai-mea, who has always purchased from us and whom we sold a few perishable items to last week, came in and they ordered him out. That was about 11:30 today.

Q. 11:30 today?

A. Yes. They informed us there are only three people permitted to be in or around Lihue Store. They did not name the three, but I assume that it's myself, Kaoru Fujii, my cashier, and Willie Albao, the office manager, because the three of us have been permitted to enter, today.

Q. That is all? A. That is all.

Q. Were any denied entry yesterday?

A. Yes.

Q. Who?

A. U. Ishii, manager, hardware department; Mr. A. G. Hutton, manager of the dry goods; Harry Nogami, our maintenance foreman, who is in charge of our refrigerators; and Joe Rapozo, who is in charge of the home appliances.

(Testimony of Leonard T. Cannon.)

Q. You witnessed their efforts to get in?

A. I did.

Q. You saw them stopped?

A. I saw them stopped, and I asked our maintenance man to try to come through again, because of the nature of his work. He is also in charge of the night watchmen. And about 9:30 he attempted to come in again and they refused him admittance and told him to get out.

Q. They did? A. Yes.

Q. There have been pickets in front of the doors of the house? A. There have.

Q. They have. In front of the doors of the store, rather. They have prevented anyone from attempting to get through there?

A. That is correct. A week ago Monday, which I believe was the 9th, they warned me on Saturday that I would not be permitted to come through; that they were going to form a wall of pickets several deep, shoulder to shoulder, in front of the doors and if I wished to come in through the front door it would be necessary to get a policeman before they would disperse.

Q. The police did not disperse them this morning?

A. To my knowledge, they have not dispersed anyone and they are there at present. [263]

Q. These persons are all members who are preventing access, you recognize any of them?

A. A great many of them, yes.

Q. As your employees?

(Testimony of Leonard T. Cannon.)

A. As our former employees and also mill employees and field employees.

Q. You recognize them as a members of the union.

A. Only by the buttons they have on their clothing or the union police or union picket bands that they have on their arms.

Q. Some of your employees who were working in the store, they have been members of the union for some time?

A. I am not certain of that, although I believe they have. We have not discussed it with them.

Q. In other words, from all that transpired you are not able to operate the store even if you so desire? A. We could not.

Q. You could not operate it anywhere near normal operation?

A. It is utterly impossible with three men. That is all they will permit.

Q. Will this result in considerable damage on that refrigeration that you have, etc.?

A. Definitely. Unless something is done in the very near future we are going to loose a lot of merchandise. In fact I had an appointment at 1:30 with Sonny Lyons. He is going to choose to condemn a lot of merchandise today.

Q. Perishable merchandise?

A. Perishable merchandise.

Q. Lost because of this situation.

Mr. Moore: That is all.

The Court: That is all.

KEITH B. TESTER

having been duly sworn, testified as follows:

Direct Examination

By Mr. Moore:

Q. Will you please state your name to the Court?

A. Keith B. Tester.

Q. You reside here in Lihue? A. Kauai.

Q. You are employed?

A. Yes, by the Lihue Plantation Company.

Q. In what capacity?

A. Assistant manager.

Q. Assistant manager. The employees are not out on strike? A. Yes.

Q. Since what time?

A. Since September 1st.

Q. That strike was called by—

A. Called by the ILWU, Local 149.

Q. This is Unit 1 of Local 149?

A. Units 1, 2 and 3.

Q. 1, 2 and 3? A. Yes.

Q. That is part of the Local 149? A. Yes.

Q. So far as you know? A. Yes.

Q. That in turn is International Longshoremen's and Warehousemen's Union? A. Yes.

Q. You have not been operating the mill except with a few employees?

A. Yes, with—oh about a dozen supervisory employees.

Q. Supervisory employees. Have they had any difficulty recently in getting into the mill?

A. They had difficulty last Saturday morning.

(Testimony of Keith B. Tester.)

Q. Saturday morning? A. Yes. [265]

Q. You were present at that time?

A. Yes, I was present.

Q. Did you attempt to get in?

A. No, I didn't attempt to get in.

Q. Did you see—they were stopped, the employees were stopped and prevented from going in?

A. Yes, they were stopped.

Q. By whom?

A. By members of Local 149.

Q. Did you see any union representatives present at that time?

A. Yes, I gather they were all union representatives or union members, but I saw somebody I know in particular.

Q. Could you state their names?

A. George Masaki, Ronald Toyofuku, Akama, Morimoto.

The Court: Just a minute. Morimoto?

A. Yes. Hamamoto, from Hanamaulu. A good many more, but I just can't recall them.

Q. You recall Paia?

A. Paia, yes; I was talking to him.

Q. What about——

A. I also saw Shimizu.

Q. Nunes? A. I don't recall seeing him.

Q. Rapozo?

A. No, they may have been there. I don't recall seeing him.

Q. Fontanilla?

A. No, I don't believe I'd know him if I saw him.

Q. Takemoto?

(Testimony of Keith B. Tester.)

A. Yes, I saw him. No, I don't believe I did see Takemoto. He may have been there, but I don't recall seeing him.

Q. But you know Nunes, Rapozo and Fontanilla as officers of the local? [266] A Yes, yes.

Q. You have had occasion to deal with them in the past?

A. Yes, we recognized them as officers of the local.

Q. Recognized them? A. Yes.

Q. They presumed to represent the local labor organization? A. Yes.

Q. The picketing and all this mass picketing and prevention of entry into the mill occurred in your presence, the ones you have named? A. Yes.

Q. With reference to the activities of the police that morning did you witness Mr. Burns discussing that? A. Yes.

Q. Attempting to get enforcement?

A. Yes, I was with him while he talked to them.

Q. You overheard what he said?

A. Yes. In fact I came up here and called the police originally. I came up to the County Building and oh probably five minutes after that one police officer arrived. Within a period of maybe oh fifteen minutes or twenty minutes they all arrived with the exception of the assistant chief. And later on he arrived and again later on after that the chief arrived.

Q. Did you overhear Mr. Burns discussing it with——

(Testimony of Keith B. Tester.)

A. Yes, I think a couple of times that the chief was talking with the group of union men. I believe Morimoto was in the group, at times Paia. Their picket chairman was there. I think it was George Masaki. Barbosa, I saw him in the group. I think there were six or eight of them to whom he was talking. Before going over myself, Mr. Burns had gone over two or three times and spoken to the chief. I don't know what he said there, but at one time he and I both went over there and Mr. Burns asked him what he was going to do about it and he said—told him to wait. [267]

Q. Told him to wait?

A. Told him to wait, yes. And the union boys rather objected to he and I standing around while they were discussing it and asked the chief if we could be requested to leave and a few minutes later—a few moments later—the chief told us we had better leave. Some time after that Mr. Burns and I again went over and Mr. Burns asked the chief then. He said, "I request to have this road opened up for our employees and the public." And again the chief told us we had better wait a while.

Q. Told you what?

A. We had better wait a while. And some time after that the chief wanted to speak to Mr. Burns and he called myself and Rockwell Smith. I believe the two of us were there while the chief was talking to Mr. Burns. At that time the chief said that after his discussion with the union members they were willing to permit certain specified persons through the picket line. I believe he stated Mr. Burns, my-

(Testimony of Keith B. Tester.)

self, Tom Watt and perhaps Rocky Smith. He is the industrial relations director. Mr. Burns then told him that he wanted the road open for——

Q. Everyone.

A. Everyone. After that, why, the chief said that the union just wouldn't let them and he said if the others attempted to go through there would be bloodshed. As a matter of fact, it looked to me like a match or anything would have flared that up. They were in very bad temper at that time. I remember Mr. Burns also said to the chief if they state there is liable to be bloodshed it would seem to him that it would be a wise thing to get enough police around so that they could be sure there wouldn't be any violence and open up the road and let the people go through.

Q. The roads have not yet been opened up?

A. The roads have not yet been opened up. [268]

Mr. Moore: That is all, your Honor.

Q. (By the Court): Is there any equipment in the mill or any machinery that needs immediate attention?

A. Well, there is—yes, I believe our crystallizers are going unless—they may have stopped them in the morning, early Saturday morning, before they left the mill, but all the power lines are tied up in the power house, and it's absolutely essential that those are looked after. The two hydro plants tie into Lihue power plant here.

Q. Who ordinarily gives attention to the crystallizers?

A. Mr. Ashton.

The Court: That is all.

CHARLES JAMES FERN

having been duly sworn, testified as follows:

Direct Examination

By Mr. Moore:

Q. Will you please state your name?

A. Charles James Fern.

Q. You reside here? A. In Lihue, yes.

Q. You were in the vicinity of the Lihue Mill on Saturday morning, September 14th?

A. I was.

Q. You witnessed mass picketing there?

A. I did.

Q. Did you witness any union representatives present?

A. Yes, I saw quite a few of them. William Paia, who is President of the union; Yoshikazu Morimoto, who, I believe, is Secretary-Treasurer of the island-wide unit. There was George Masaki, Teru Akama, Jerry Matsuyama and several others that I am not—quite a few others that I am not sure about their names.

Q. They were present while this mass picketing was going on? A. Yes. [269]

Q. No one was getting into the mill, none of the employees attempting to get in the mill at that time?

A. The employees were standing up the road quite a distance from the group of picketers that were massed across the road.

Q. Did you ever hear any of the conversation of the union men concerning what action they might take?

(Testimony of Charles James Fern.)

A. When I got—I first got there, I stopped at—Mr. Burns was up the hill a ways and I stopped and asked him what was going on. He suggested I see the chief of police, so I drove down a bit and parked my car and got out of the car and walked over where Chief Crowell was consulting with this group that I have named. They were all squatted down and the chief was saying to them—just as I got there the chief said to them, “Now, you boys know that this is one of the things that in a conference with the County Attorney you were told could not be permitted; that you have to let people in and out of private property.” There was no answer whatsoever from the group. They didn’t say aye, yes or no. And then Chief Crowell said to them, he says, “I would like you fellows”—this is roughly his conversation—“I think you fellows ought to clear this road and disperse.” And Morimoto stood up and said, “I have to make a phone call first,” and he went away. He walked over toward the warehouse and where he went from there I don’t know. And then the group broke up and I spoke to the chief. I said, “What’s the phone call?” and I inferred from what he said or understood him to say that he was going to call Honolulu. Then fifteen or twenty minutes—I don’t know how—there was so much doing it was hard to keep tract of time—Morimoto came back and he met with some of the leaders and there was great activity going on.

Q. Among the union?

(Testimony of Charles James Fern.)

A. Among the union. They began calling union police this way, line up here boys, with the union police in front. And somebody [270] came down with a camera and they wanted a picture of the picket line. Somebody got on top of the little fire house there and they began lining them up I think for the picture as much as to hold the line. So there was quite a bit of organized work as far as dispersing the men over toward the warehouse and orders were being issued. And finally they seemed to get set as to what they wanted to do. In the meantime Mr. Burns had come over to the police—chief of police—and told him that the situation was rather tense, he felt, and he was sending the men home, because he felt it would ease the situation, but he told the chief that “when you are ready to enforce the law, I want these men to go in the mill.” And then the supervisors all left there amid boos and catcalls, and after that it quieted down.

I noticed Morimoto standing on the, say the makai side—makai end—of the line, that is, near the stream. I walked over to him and I said, “Is this the result of your phone call to Honolulu? Have you been instructed to hold the line?” And he says, “Yes, we are holding the line.” And so I walked out and watched them develop.

I went over to Chief Crowell and asked him, “What’s the score now?” He said—well he said—called to Captain Fernandez, Assistant Chief Fernandez, he said, “You go get Keahi and tell him”—I think he said—“to bring the riot act with him.”

(Testimony of Charles James Fern.)

So I said, "You are going to read the riot act to him?" He said, "Well, Mr. Tavares told me that in cases of this kind where the riot act has to be read to make them disperse that I should have the district magistrate do it." So Mr. Fernandez left and then there was no—it was rather quiet for a while. And then the County Attorney came along in his car. He stepped out of the car and had a conference with Mr. Crowell and I stepped down and joined them while they were conferring and I heard the [271] County Attorney tell Mr. Crowell, "You can't do a thing. You can't escort anybody through the picket line. You can't clear the road. You can't do anything until they slug somebody." Then Crowell turned away and I asked him what he was going to do. He sort of made a motion—no, no, Crowell asked to be excused then, that he wanted to confer privately with the County Attorney and I walked away. And then later, I saw Mr. Crowell and I asked him what he was going to do and he just shrugged his shoulders and didn't have any further comment. And then I went over and used the phone. When I came back it was about ten minutes past nine. They were still massed there but there was no excitement, so I decided to go back to my office.

Q. This Morimoto and various other names you mentioned, they were wearing union badges?

A. I didn't notice. I noticed some of them had arm bands on, but—

(Testimony of Charles James Fern.)

Q. You know them as members of the union?

A. I know that Mr. Morimoto is Secretary-Treasurer. I know Mr. Paia is the President of the local union, that is, the Kauai Unit.

Q. All of this continued after they had, from your information, talked to Honolulu?

A. All this development of—the thing was more or less unorganized before Morimoto came back. There was a good deal of cheering and catcalling but there was no organized massing or anything else, they were sort of milling. Nobody was attempting to go through the picket line and no one was apparently trying to stop anybody, but when Morimoto came back he went over directly. I didn't see him talk to Chief Crowell at all. I don't know where Crowell got the message of what the result was, but when Morimoto came back, then there was a good deal of shouting and captains this way and things like that, union police this way, and I know they were running around. One of the men that was carrying [272] a union police captain badge—I don't know his name—was running and handing these badges to various people and I heard him say, "All right, line up the union police in front."

Q. And they proceeded to do that?

A. Yes.

Mr. Moore: That is all, your Honor.

Mr. Kaulukou: I offered my services as amicus curiae in this matter. I would like to ask a few questions of Mr. Fern.

The Court: As an amicus of the Court you may do so.

(Testimony of Charles James Fern.)

Mr. Kaulukou: I would like to ask one question. Did you actually hear me use the word "slug"?

A. That is what I understood you to say. You might——

Mr. Kaulukou: I am asking you whether you heard me use the word "slug" or is that your idea of my position amounting to something in violation of our statutes? I don't remember using the word "slug" at all.

A. It might have been something else, but I know it ended on someone. It might have been "slug," it might have been "hit," it might have been "hurt." I am not certain on the slug, but that is what I understood you to say. I don't know that I have ever heard you use that word, very frankly, but that was just the impression that I got out of it.

The Court: The impression you got out of it, Mr. Fern, was that the County Attorney advised the Chief of Police he could take no action unless there was an overt act; is that it?

A. That's it, exactly.

Mr. Moore: That is all.

The Court: That is all.

(Court recessed at 1:25 p.m. and reconvened at 3:03 p.m.)

The Court: You are recalling Mr. Tester, are you?

Mr. Moore: I am calling Mr. Tester.

The Court: Mr. Tester has already been sworn. You may proceed. [273]

(Testimony of Charles James Fern.)

Direct Examination

By Mr. Moore:

Q. Mr. Tester, can you identify this letter?

A. Yes, this is a letter from Y. Morimoto as the business agent of the ILWU, Local 149. It states on the letter: Will you please recognize the following 1946 officers of Local 149 Unit 1:

President, Joseph Nunes; 1st Vice-President, Daniel F. Rapozo; 2nd Vice-President, Fernando Fontanilla; Recording Secretary, Tom Takemoto; Financial Secretary, Sunao Iwamoto.

The Court: Is that S-u-n-i-o or S-u-n-a-o?

A. S-u-n-a-o.

Q. This letter was received by the Lihue Plantation Company; this is the file copy?

A. Yes, this is the file copy.

The Court: You are not offering this in evidence, are you, or——

Mr. Moore: We can do that. We can offer it in evidence. That is the last communication we had from the union. Of course, at all times union officers are subject to change and we can go only on our knowledge of the latest communication they send.

The Court: It will be accepted in evidence and marked Petitioner's Exhibit—next in order. What will that be?

The Clerk: 24.

The Court: Exhibit 24.

(Testimony of Charles James Fern.)

Q. These officers to your own knowledge have participated actively in the affairs of Local 149?

A. They have, yes.

Q. They have been present at meetings that you have had? A. Yes.

Q. Management and the union? A. Yes.

Q. You have recognized them? A. Yes.

Q. As the officers? [274]

The Court: The Court is satisfied that the petitioner has made a prima facie showing warranting the issuance of an order to show cause.

The Court further finds that the instant matter is very similar to the case of Westinghouse Electric Corporation v. United Electrical, Radio & Machine Workers of America (CIO) Local 601, et al., as set forth in the opinion of the Supreme Court of Pennsylvania, recorded in the advance sheets of Atlantic Reporter, 2d Series, the citation being 46 A. 2d No. 1, at page 16 et seq.

In this instance, the Court is satisfied that there has been a prima facie showing that the respondents in this case, The Lihue Plantation Company, Limited, Petitioner, v. International Longshoremen's and Warehousemen's Union (CIO), Local 149, and others, have exceeded the bounds of peaceful picketing, in that they have prevented the employer, through its supervisory employees and its chief executive as he may be called—general manager—from entering at will the sugar factory, or that which is called the mill, of the plantation corpora-

(Testimony of Charles James Fern.)

tion; also, that the respondents have prevented free access to the general merchandise store known as the Lihue Store of The Lihue Plantation Company, Limited, and in effect have taken possession and control of both the factory and the store; and they have also been guilty of mass picketing and the use of intimidation.

As was said in the Westinghouse Electric Corporation case by the Supreme Court of Pennsylvania: "Freed from the restrictions imposed by the Labor Anti-Injunction Act"—which, presumably, was the Pennsylvania Act; there is none such in this Territory—"there is no doubt that plaintiff is entitled to an injunction in this case" in accordance with the *prima facie* showing made in the instant matter. "The Court is not unmindful of, and certainly not unsympathetic with, the trend which has developed in connection with the issuance of injunctions in labor disputes from the days when even peaceful picketing was enjoined to the present time when the Norris-LaGuardia Act" . . . "declared current public policy with respect to that subject."

Again quoting and adopting the language of the Supreme Court of Pennsylvania: "But picketing to the extent to which it is designed to seize and in effect does seize and hold the employer's plant by the methods here employed does not fall within either constitutional, statutory, common law or equitable protection."

(Testimony of Charles James Fern.)

This chancellor feels that the petitioner herein has shown satisfactory *prima facie* evidence of irreparable damage, not because of any destruction of or injury to its plant, but because of the interruption of vital activities necessary by way of preparation for future business and production; and, in the instance of the Lihue Store refrigerating plants, it has shown further *prima facie* that serious loss may be sustained and if not enjoined may continue, the amount of which may not be determined at present and cannot be taken care of by compensatory damages.

To that extent the Court makes this finding that there has been a sufficient showing preliminary to the issuance of an order to show cause, as prayed for in the petition for an injunction herein.

The Court: You have an order to show cause to present at this time?

Mr. Moore: Yes, sir, I have.

The Court: What is your desire, Mr. Moore—to have the order to show cause returnable in ten days?

Mr. Moore: Ten days is our desire, yes.

The Court: You have a motion for a temporary restraining order at this time?

Mr. Moore: I do. [276]

The Court: To present in connection with the order to show cause?

Mr. Moore: I do.

The Court: You wish to file this motion at this time?

Mr. Moore: I do.

(Testimony of Charles James Fern.)

The Court: Presumably, if the petition to issue a temporary injunction—a motion—is entertained, there should be copies which could be served on the respondents, together with the order to show cause.

Mr. Moore: I have drafted, your Honor, for your consideration, a proposed temporary restraining order.

The Court: You desire that considered in connection with the order to show cause and the motion for temporary restraining order; is that it?

Mr. Moore: That is right.

The Court: That is a matter for the Court's attention alone. This hearing will therefore be closed.

(Court adjourned at 3:17 p.m.)

I Hereby Certify that the foregoing is a full, true and correct transcript of my shorthand notes of the evidence adduced at the hearing had on September 17, 1946, in Equity No. 120.

/s/ KENICHI UMEMOTO,

Court Reporter.

[Endorsed]: Filed July 21, 1947. [277]

In the United States District Court for the
District of Hawaii

Civil No. 769

CONSTANCIO R. ALESNA, et al.,

Plaintiffs,

vs.

PHILIP L. RICE, as Judge of the Circuit Court
of the Fifth Judicial Circuit of the Territory
of Hawaii; and C. NILS TAVARES, as Attor-
ney General of the Territory of Hawaii,

Defendants.

ANSWER TO COMPLAINT
OF C. NILS TAVARES, DEFENDANT

C. Nils Tavares, one of the defendants in the
above-entitled cause, answering the complaint
herein, hereby adopts as his answer to said com-
plaint the answer made and filed for and on behalf
of the Honorable Philip L. Rice, Judge of the Cir-
cuit Court of the Fifth Circuit, Territory of Hawaii.

And further answering said complaint, said de-
fendant alleges that he is no longer Attorney Gen-
eral of the Territory of Hawaii, having resigned
from such office on the 30th day of June, 1947.

Dated at Honolulu, T. H., this 21st day of July,
1947.

/s/ RHODA V. LEWIS,

Acting Attorney General,

Attorney for Defendant.

[Endorsed]: Filed July 21, 1947. [279]

[Title of District Court and Cause.]

MOTION FOR HEARING AND DETERMINA-
TION OF DEFENSES BEFORE TRIAL

Come now Philip L. Rice, Judge of the Circuit Court of the Fifth Circuit, Territory of Hawaii, and C. Nils Tavares, the defendants in the above entitled cause, and show to the Court that in the answer made and filed herein for and in behalf of said defendant Philip L. Rice, which answer was adopted by said defendant C. Nils Tavares, the following defenses were pleaded in paragraphs XXV to XXX, inclusive:

“XXV.

“The complaint fails to state a cause of action for equitable relief in that criminal proceedings in the course of which and on review of which all defenses may be asserted, heard and determined by the circuit and supreme courts of the Territory, and, to the extent asserted under the laws and Constitution of the United States, by the Circuit Court of Appeals of the Ninth Circuit and the Supreme Court of the United States, do not constitute a threat of irreparable injury.

“XXVI.

“The complaint fails to state a cause of action for equitable relief in that it appears upon the face of the complaint that it seeks to stay proceedings pending in a circuit court of the Territory, [281] and that the case does not relate to any proceeding in bankruptcy.

“XXVII.

“This court has no jurisdiction to issue an injunction against the judge of a circuit court of the Territory of Hawaii.

“XXVIII.

“The judge of a circuit court of the Territory of Hawaii cannot properly be made a party to a proceeding in which an injunction is sought to restrain further proceedings in an action pending before such circuit court.

“XXIX.

“The complaint fails to state a cause of action for equitable relief or any other relief.

“XXX.

“The complaint fails to state a cause of action in that, as appears on the face of the complaint, the amended temporary restraining order issued in that certain equity action numbered 120, appended to the complaint, was issued by the Honorable Philip L. Rice, Judge of the Circuit Court of the Fifth Circuit, Territory of Hawaii, in the exercise of his powers as a circuit judge at chambers of the Territory of Hawaii.

“That a Circuit Judge at Chambers of the Territory of Hawaii, pursuant to the Hawaiian Organic Act and the laws of the Territory of Hawaii, is a court of general jurisdiction with full equity powers and that its orders must be obeyed by persons subject to the jurisdiction of said court, until and unless set aside or reversed; that this is true whether or not the action of the court in issuing said amended

temporary restraining order was erroneous; that the said Circuit Court has jurisdiction to determine its own jurisdiction, and that violations of its amended temporary restraining order constitute criminal contempt irrespective of the ultimate disposition of the questions relating thereto raised herein by the plaintiffs' first and second causes of action, based on the Norris-La Guardia and Clayton Acts; that the said Circuit Court has jurisdiction to determine questions of constitutional law, with power to issue an ex parte order for the purpose of preserving rights alleged to be unlawfully invaded to the irreparable injury of the petitioners in the territorial court, pending the return on the order to show cause why an injunction should [282] not issue; and that violations of the amended temporary restraining order issued by defendant constitute criminal contempt irrespective of the ultimate disposition of the questions raised herein by plaintiffs' third and fourth causes of action, based on the Norris-La Guardia and Clayton Acts and the Constitution of the United States."

Wherefore, defendants pray the Court to hear and determine the above defenses before the trial of the principal case pursuant to the provisions of Rule 12 (d) and to dismiss this suit as to both defendants.

Dated at Honolulu, T. H., this 22nd day of July, 1947.

/s/ MICHIO WATANABE,
Deputy Attorney General, Territory of Hawaii,
Attorney for Defendants.

NOTICE OF MOTION

To: Harriet Bouslog and Myer C. Symonds,
Attorneys for Plaintiffs:

Please take notice that on Monday, the 28th day of July, 1947, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, at the courtroom of the United States District Court for the District of Hawaii, Federal Building, Honolulu, T. H., the foregoing motion will be presented to the Court.

Dated at Honolulu, T. H., this 22nd day of July, 1947.

/s/ MICHIO WATANABE,
Deputy Attorney General, Territory of Hawaii,
Attorney for Defendants. [283]

Service of the foregoing Motion and Notice of Motion acknowledged this 22nd day of July, 1947.

/s/ HARRIET BOUSLOG,
/s/ MYER C. SYMONDS,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 22, 1947.

[Title of District Court and Cause.]

MOTION TO STRIKE

Come now the plaintiffs in the above-entitled cause, by their attorneys, Harriet Bouslog and Myer C. Symonds, and move the court to strike from the answers of the defendants herein filed on the 21st day of July, 1947, the following allegations thereof:

1. Paragraph V, the words "as more fully appears in Exhibit A, hereto annexed," and such words where they are incorporated by reference in paragraphs XIV, XVI and XVIII.
2. Paragraph XXIV, each and every allegation contained therein; including Exhibits A and B incorporated therein by reference.

The grounds for said motion are that said allegations [286] and exhibits are redundant, immaterial and impertinent.

Dated: Honolulu, T. H., this 11th day of August, 1947.

/s/ HARRIET BOUSLOG,

/s/ MYER C. SYMONDS,

Attorneys for Plaintiffs.

NOTICE OF MOTION

To Rhoda V. Lewis and Michiro Watanabe, Attorneys for Defendants:

Please take notice that the undersigned will bring the above motion on for hearing in the courtroom of the above-entitled court on the 15 day of August, 1947, at 9 a.m., or as soon thereafter as counsel may be heard.

/s/ HARRIET BOUSLOG,

/s/ MYER C. SYMONDS,

Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 11, 1947. [287]

[Title of District Court and Cause.]

STIPULATION AND ORDER

C. Nils Tavares, having resigned as Attorney General of the Territory of Hawaii on June 30, 1947, and Rhoda V. Lewis now being the duly appointed and Acting Attorney General of the Territory of Hawaii, it is hereby stipulated by the undersigned that, without prejudice to the proceedings already had herein, Rhoda V. Lewis, as Acting Attorney General of the Territory of Hawaii, may be substituted as a defendant herein in place of C. Nils Tavares as Attorney General of the Territory of Hawaii, as of July 1, 1947, that the answer, motions and all proceedings and orders entered herein on or since July 1, 1947, shall be deemed to have been filed, made or apply (as the case may be) to the substituted defendant, and that the preliminary injunction herein entered on February 20, 1947, shall apply to the substituted defendant.

Dated: Honolulu, T. H., this 14th day of August, 1947.

/s/ HARRIET BOUSLOG,

/s/ MYER C. SYMONDS,

Attorneys for Plaintiffs.

/s/ RHODA V. LEWIS,

Acting Attorney General of
the Territory of Hawaii.

It Is So Ordered.

/s/ J. FRANK McLAUGHLIN,

Judge of the Above-
Entitled Court.

[Endorsed]: Filed Aug. 20, 1947. [289]

[Title of District Court and Cause.]

MOTION

Come now Philip L. Rice, Judge of the Circuit Court of the Fifth Circuit, Territory of Hawaii, and Rhoda V. Lewis, Acting Attorney General, Territory of Hawaii, the defendants in the above-entitled cause, and hereby move that this Court, in ruling upon defendants' motion to dismiss the complaint filed July 22, 1947, take into consideration the whole record made by the pleadings, including the exhibits annexed to the complaint and answers.

This motion is based upon rules 12 and 56 of the Rules of Civil Procedure. [291]

Dated at Honolulu, T. H., September 4, 1947.

/s/ RHODA V. LEWIS,
Acting Attorney General,
Territory of Hawaii.
Attorney for Defendants.

NOTICE OF MOTION

To: Harriet Bouslog and Myer C. Symonds, Attorneys for Plaintiffs:

Please take notice that on Monday, the 8th day of September, 1947, at 9:00 o'clock a.m., or as soon thereafter as counsel can be heard, at the courtroom of the United States District Court for the District of Hawaii, Federal Building, Honolulu, T. H., the foregoing motion will be presented to the Court.

Dated at Honolulu, T. H., September 4, 1947.

/s/ RHODA V. LEWIS,
Acting Attorney General,
Territory of Hawaii,
Attorney for Defendants.

Service of the foregoing Motion and Notice of Motion acknowledged this 4th day of September, 1947.

/s/ HARRIET BOUSLOG,
/s/ MYER C. SYMONDS,
Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 4, 1947. [292]

In the United States District Court for the
District of Hawaii

October Term, 1947

Civil No. 769

CONSTANCIO R. ALESNA, et al.,

Plaintiffs,

vs.

PHILIP L. RICE, as Judge of the Circuit Court
of the Fifth Judicial Circuit of the Territory
of Hawaii; and C. NILS TAVARES, as Attor-
ney General of the Territory of Hawaii,

Defendants.

DECISION UPON MOTION FOR DETERMI-
NATION OF DEFENSES IN ADVANCE
OF TRIAL—F.R.C.F. 12 (d)

For a statement of the facts of this case which arises under the Civil Rights Act (28 U.S.C. Sec. 41 (14)), grows out of the 1946 strike in the sugar industry of Hawaii, and involves a criminal contempt indictment pending in a Territorial Circuit Court, see its initial phase reported in 69 F. S. 897. This reference discloses that a preliminary injunction issued restraining the defendant Attorney General of the Territory from proceeding further with the prosecution of the plaintiffs for contempt of the Territorial Court.

As mentioned in the intervening case of Hall, et al., vs. Hawaiian Pineapple Company, Ltd., 72 F. S. 533 at 536, the issues left in balance should

have been determined earlier. However, with the criminal contempt proceeding in the Fifth Circuit Court held up by the preliminary injunction, the plaintiffs were not overly insistent upon [294] proceeding to trial and therefore consented to the several extensions of time requested by the Territorial Attorney General's office. When the case began, the then Attorney General was not prepared to reach the constitutional issues, for he was short of assistants and time as he was then serving the Territorial Legislature which was in session at that time. Thereafter, Mr. Tavares resigned as Attorney General and Miss Lewis took over control of the office. While she too directed the office with an inadequate number of assistants, the office in June became involved in the tense pineapple strike described in *Hall, et al., vs. Hawaiian Pineapple Company (supra)*. Accordingly, the court too being otherwise engaged, numerous stipulations extending time were approved. On July 21, 1947, the defendants filed their Answers. It may be here noted that incidentally as of this date, the Territory has a new Attorney General, though no formal request for substitution has been presented.

On July 22, 1947, the defendants filed this Motion under F.R.C.P. 12 (d), (28 U.S.C. following Sec. 723-c), and it was set for hearing August 26, 1947. Prior to that date, Mr. Jenks applied on behalf of the Hawaii Employers Council for permission to appear in the case as an *amicus curiae*. The application was resisted by the plaintiffs and favored by the defendants. The request was granted over objection August 11, 1947.

The oral arguments upon this Motion were extensive and when, due to interruptions, they were finally concluded on September 8, 1947, permission was granted to file briefs. On September 12, 1947, the plaintiffs filed a ninety-three page brief, the *amicus curiae* one of fifty-nine pages and the defendants a two-page memorandum. Until now [295] other court business has prevented the complete digestion of these briefs.

The Motion presents for consideration six of the defenses set up in the Answer. Summarized these are as follows:

1. That the complaint fails to state a cause of action in that the plaintiffs have an adequate remedy in the criminal contempt prosecution in the Territorial Court as there all defenses could be asserted and the constitutional issues raised subject to a right of appeal to the Territorial Supreme Court and, if need be, from there to the U. S. Supreme Court.
2. That the Comity Statute—28 U.S.C. Sec. 379—denies this court jurisdiction of the complaint.
3. That this court has no jurisdiction to enjoin a Territorial Judge.
4. That such a judge is not a proper party defendant.
5. That the complaint fails to state a cause of action for equitable or any other relief, and
6. That even if the Territorial Court's Amended Restraining Order was void, it will support an indictment for contempt. [296]

At the outset, the court posed for the parties consideration the correctness of its prior holdings that the Civil Rights Act's remedies were available in Hawaii despite the fact that in conferring jurisdiction upon District Courts Congress omitted the word "Territory." Both agreed with the court that as the Act applies specifically to a Territory and confers upon one, whose civil rights secured by the Constitution and laws of the United States have been denied by another under color of the law of any Territory, a right to sue at law or in equity for redress (8 U.S.C. Sec. 43), jurisdiction exists in a legislative Federal court in a Territory and may be invoked by one in a proper case despite the fact that the Congress left out the word "Territory" in granting jurisdiction of such suits to United States District Courts.

In the light of the history, the objective and the wording of the whole Act, the word "state" appearing in 28 U.S.C. Sec. 41 (14) should not be narrowly interpreted. Indeed there is more reason under the Civil Rights Act to interpret liberally the word "state" to include "Territory" than to do likewise with reference to 28 U.S.C. Sec. 380 as has recently been done by a three-judge court sitting here in the case of *Mo Hock Ke Lok Po, et al., vs. Ingram M. Stainback, Governor, et al., Civil No. 765* (October 22, 1947). But see dissent by Denman, Circuit Judge. In that case it has been specifically held that Congress by not including the word "Territory" in 28 U.S.C. Sec. 41 (14) intended to leave such issues to litigation in Territorial courts unless

the Federal jurisdictional amount was alleged. Perhaps that ruling is binding here. But, regardless, to hold that for the purposes of this Act, the word "state" does not include Territory would be to prevent the will of [297] Congress having its effect in this part of the United States. Yet Congress intended to protect the Constitutional and Federal civil rights of all people everywhere in the nation. See *Screws vs. United States*, 325 U.S. 91, 98 (1945). Since 1900 Hawaii has been an incorporated part of the United States, and the Federal rights of its people are not a single iota less valuable than are those of the inhabitants of a state. (See 48 U.S.C. Sec. 491 et seq.) Having created the right, having given this legislative court the jurisdiction of a "court of the United States" (48 U.S.C. Sec. 641 et seq.), and having made applicable to the two incorporated Territories the criminal provisions of the Act, (18 U.S.C. Sections 51, 52) there is no insurmountable obstacle to making effective by judicial action the granted civil remedy in a Territory for such an important right and thus curing what seems to be an oversight or an imperfection in the statute. *Keifer & Keifer vs. Reconstruction Finance Corporation*, 306 U.S. 381, 389 (1939); *Texas & M.O.R. Railway Co. vs. Railway Clerks*, 281 U.S. 548, 568 (1930).

Before reaching the defendant's Motion, counsel for plaintiffs suggested that the court had no jurisdiction to entertain it as the defendants had not appealed from the Order granting the preliminary injunction. (28 U.S.C. Sec. 227). Having resisted

issuance of the preliminary injunction, plaintiffs argue that defendants cannot be heard again upon the same or similar questions of law, and that the only thing remaining to be done is to proceed to trial. The Court ruled against plaintiffs because it believed, amongst other reasons, that the constitutional issues had not been examined adequately heretofore on account of the Attorney General's reluctance in February to reach them in his [298] argument upon the prayer for a preliminary injunction. The Statute permitting appeals from Interlocutory decrees granting preliminary injunctions does not require a party to appeal at that time. He may, at his option, await the final decree and raise all questions by appealing from it. *Victor Talking Machine Company vs. George*, 105 F. (2) 697—C.C.A. 3rd (1939). That being so, there is no rule of law which prohibits a party defendant from taking advantage of F.R.C.P. 12 (d) in the absence of an Order of the Court deferring consideration of the defenses in point of law until trial. No such order was made here for the essential facts necessary to a consideration of the questions of law are amply set forth in the voluminous pleadings.

Attached to the defendants' Answer, incorporated as a part thereof, are two lengthy exhibits. These exhibits constitute the complete record of all that transpired in the Fifth Circuit Court of the Territory from the date the Lihue Plantation Company applied for equitable relief until the court, upon its own Motion, amended its Restraining Order. Soon after the defendants' Answer was filed, plaintiffs

moved to strike paragraphs V and XXIV of the Answer of which these exhibits were made a part on the grounds of redundancy, impertinency, and immateriality. During the course of argument upon this Rule 12 (d) Motion, a question arose as to whether or not this court could consider these exhibits to see the basis for the Territorial Court's issuance of its Amended Restraining Order issued by Judge Rice. Plaintiffs argue that it is improper to look behind the Order and besides it is void on its face. [299]

If need be, the court may consider the exhibits attached to and made part of the pleadings of both parties. Together they reveal every step taken in the Territorial Court and are either certified copies (defendants) or copies thereof (plaintiffs). On the other hand, if those attached to the Answer be deemed improper pleading, the defendants' Motion that the court consider them in connection with the Rule 12 (d) Motion transforms that into a "speaking Motion" countenanced by the Federal Rules of Civil Procedure. See Rule 12 (b) and notes thereunder. See also *Samara vs. United States*, 129 F. (2) 594 at 597, C.C.A. 2nd (1942); *Gallup vs. Caldwell*, 120 F. (2) 90 at 92, C.C.A. 3rd (1941); and Rule 12 (b) with approved amendment. The Certificate of the Clerk of the Territorial Court provides here even a better guarantee of factual certainty than an affidavit. In any event, with a certified record of all steps taken in the Territorial Court attached to the pleading, to consider them under Rule 12 (b) as transposing the pending Motion into

one for Summary Judgment under Rule 56 would be an act of judicial economy. What did happen in the Territorial Court is beyond all dispute but the technical point that allegations in an Answer are deemed denied. But this point is irrelevant to a speaking Motion. There is before this court a reliable record of everything the Territorial Court did and said, including argument of counsel, affidavits and the evidence of witnesses who testified. This court may consider that record if need be in disposing of the Motion.

Plaintiffs' pending Motion to Strike those parts of defendants' Answer may also be taken as hereby denied. [300]

With preliminary technicalities disposed of, we come to a consideration of the major contentions of law.

As indicated to counsel during oral argument, the court adheres to its former rulings that the Norris-La Guardia Act, 29 U.S.C. Sec. 101 et seq., does not apply to the Courts of the Territory. Nor does it give this Federal Court exclusive jurisdiction to issue in the Territory injunctions in labor disputes in consonance with the terms of the Norris-La Guardia Act. See *Alesna, et al., vs. Rice, et al., and Hall, et al., vs. Hawaiian Pineapple Company*, (both *supra*).

In the Pineapple case, it was stated that under the decision in *United States vs. Hutcheson*, 312 U.S. 219 (1941), the rights of labor set forth in Sec. 20 of the Clayton Act, 29 U.S.C. Sec. 52, and Sec. 4 of the Norris-LaGuardia Act, 29 U.S.C.

Sec. 104, have been federalized as substantive rights, and that those substantive rights are binding upon the Territory. When re-examined, at the suggestion of both counsel, the statement is found to be inaccurate as it is too broad and general. To the extent that the rights enumerated in the Clayton and Norris-La Guardia Acts coincide with rights guaranteed by the First Amendment to the Constitution, they are, of course, binding upon the Territory. Beyond that they are not binding upon the Territory any more than they are upon a state—which is not at all—for both Acts are limitations upon, and only upon, the Federal Government and its courts. Both Acts were passed to correct judicial interpretations making applicable to labor organizations and activities the Sherman Anti-Trust Act. By what it thought was clear [301] legislation, Congress has twice notified the courts that labor organizations and activities are exempt from the Sherman Act, *Wilson & Co. vs. Birl*, 105 F. (2) 948 at 952, C.C.A. 3rd (1939). In the Clayton Act, Sec. 20, Congress disclosed that none of the specified Acts shall be “held to be violations of any law of the United States.” The history of this phase reveals that originally, as it came to the Senate from the House, the wording was “nor shall any of the Acts specified in this paragraph be considered or held to be violations of the Anti-Trust laws.” Upon the Senate floor, the present wording of Sec. 20 was adopted and from the discussions it is apparent that the intent was to modify the Sherman Act and any other Federal statute which might have a bear-

ing thereon. See Congressional Record, 63rd Congress, 2nd Session, Vol. 51, Part 14, pages 14365-14367. In any event, the limitations were upon the Federal Government, and not an invasion of the rights of the states. And as also before noted, there is nothing in either the Clayton Act or the Norris-La Guardia Act which under the doctrine of the *Hutcheson Case* must be construed together with the Sherman Act as a single piece of integrated legislation—which evidences an intention by Congress to decrease, as it could have, the measure of domestic power which it had in 1900 given the Territory of Hawaii. A limitation upon the broad domestic powers previously given the Territory is not presumed. *Puerto Rico vs. Shell Co. (P.R.) Limited, et al.*, 302 U.S. 253, at 260-263 (1937); *Inter-Island Steam Navigation Co. vs. Territory of Hawaii*, 305 U.S. 306 at 312 (1938); *Kawananakoa vs. Polyblank*, 205 U.S. 349 at 353 (1907), and *Yerian vs. Territory of Hawaii*, 130 F. (2) 786, C.C.A. 9th (1942). [302]

That the Clayton and Norris-La Guardia Acts are limitations upon Federal law only is to be noted in the decisions of the Supreme Court in *Allen-Bradley Co. vs. Board*, 315 U.S. 740 at 748 (1942) and *Apex Hosiery Co. vs. Leader*, 310 U.S. 469 (1940).

With all prior rulings in this case adhered to—including the propriety of the circuit court judge being a party defendant, *Picking, et al., vs. Pennsylvania R.R. Co.*, 151 F. (2) 240 at 250, C.C.A. 3rd (1945)—thus once again disposing adversely to

the defendants of their first four contentions, with the generalization in the Pineapple case clarified, we reach the two points which in issuing the preliminary injunction, the court stated would need further examination. *Alesna vs. Rice*, 69 F.S. 897 at 901.

The questions specifically are: Did Judge Rice's Amended Restraining Order violate plaintiffs' rights, guaranteed by the First Amendment (1) to freedom of speech and (2) to assemble peaceably?

Before touching these delicate and important questions, it may be well to restate that where the constitutional rights of individuals are at stake, a Federal Court has a peculiar duty to step in, in a proper case, and if need be protect the individual against a threatened unjustifiable exercise of the power of a state or Territory. The adequacy of an opportunity to become a defendant in a criminal case and to then raise the same question of law before a court also bound by the Constitution is questionable. As Borchard points out, it is not at all a remedy. It is a hazard. See "Challenging Penal Statutes," Edwin Borchard, 52 Yale L.J. 445 at 461. True such has often [303] been assigned as a reason for declining to act, but it is not an impressive one, at least in a First Amendment case. See *Douglas vs. Jeannette*, 319 U.S. 161 (1943). Where vital human liberties protected by the First Amendment, as distinguished from property rights, are at stake and are on the verge of possibly being crushed by the power of the State or Territory, a Federal court in a case alleging unusual circum-

stances is justified in acting despite the availability of a remedy later in the State or Territorial courts. The motivating philosophy in cases such as this has been well expressed in *Stapleton vs. Mitchell*, 60 F.S. 51, where at p. 55 the court said:

“In sum, it seems fairly plain that although the state courts are the preferable forum for the adjudication of the question whether a state statute offends against the Federal Constitution on the theory that state courts equally with the Federal courts are charged with the duty of safeguarding constitutional rights, and since they are the sole judge of the meaning and import of a state statute they should be the first judge of whether state law transcends rights protected by the Federal Constitution. But, where as here, fundamental human liberties are drawn in issue, the Federal courts are a proper forum for the determination of the question whether a state statute trespasses upon an area which the Federal Constitution has set apart as hallowed grounds for expression of democratic ideas. We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.”

The plaintiffs have been indicted for criminal contempt. The Territorial law defines criminal con-

tempt as a felony but also gives the court power to punish contempt summarily, R.L. of H. 1945, Sec. 11140. In the many years that this law has been in effect, this is said to [304] be the first time that a Territorial judge, instead of using his summary powers, referred the matter to the grand jury. The indictment charges plaintiffs with being in contempt in that——

1. They picketed in mass at a designated time and place for the purpose of obstructing and interfering with ingress to or egress from the Lihue Plantation Company's property by its employees, and other lawfully seeking to enter or leave the company's property; and that
2. They picketed additionally at said time and place in groups of more than three at points of ingress and egress to the Company's property, and the pickets were not in motion nor at least ten feet apart,

all, it is charged, contrary to the terms of the Fifth Circuit Court's Amended Restraining Order.

The portions of this Amended Restraining Order which plaintiffs strenuously assert violated their constitutional rights to freedom of speech and to assemble peaceably are to be found in Sec. 7 of the Restraining Order and its concluding "in furtherance" cause. [305]

The defendants' position is——

1. That the paintiffs have not stated a claim for relief. The decision of the court in *Hall vs. Hawaiian Pineapple Company*, *supra*, it is said disposes of the questions of law here in that what the

Territorial Court did was in the exercise of its powers and the plaintiffs should present their defenses in the Territorial forum.

2. That upon the authority of *United States vs. United Mine Workers of America*, 330 U.S. 258 (1947), even if Judge Rice's Order was void, it still will support an indictment for contempt for such an Order must nevertheless be obeyed until set aside by orderly judicial processes.

3. That the First Amendment does not guarantee the right of mass picketing in order to prevent ingress and egress to property.

4. That Judge Rice's Order is not unreasonable, but it is designed to fit temporarily a particular situation, and in no way interferes with plaintiffs' right to assemble peaceably elsewhere than at points of ingress and egress to Company property.

The plaintiffs' numerous contentions are——

(a) Exceptional circumstances are alleged in that

(1) It is alleged that the defendants engaged in a course of conduct to oppress and intimidate plaintiffs and other working men in the Territory so that they would fear to exercise their rights. [306]

(2) The plaintiffs have been singled out and selected for prosecution under a statute never before used, all pursuant to a plan to intimidate and coerce plaintiffs and others in the exercise of their rights. That plaintiffs were singled out for prosecution because they were Union officers.

(3) The pendency of this criminal contempt case is an employer weapon to instill fear, spread confusion and weaken the Union's and plaintiffs' rights.

(4) Appeals would be costly and of no avail at least until the Ninth Circuit Court of Appeals was reached as the Supreme Court of the Territory in *I.L.W.U. vs. Wirtz*, 37 Haw. 404 (1946) has ruled adversely to plaintiffs' contentions concerning the Clayton and Norris-La Guardia Acts.

(5) Here Judge Rice is the legislator, the wronged person, the prosecutor, and the executor.

(6) It is even claimed that it is contempt to violate a void Order.

(b) The decision in *Hall vs. Hawaiian Pineapple Company*, *supra*, does not control this case, for the reasons that

(1) This case is not moot. Special circumstances are alleged and plaintiffs are in peril of being unlawfully prosecuted for a felony.

(2) The Amended Restraining Order violates the First Amendment.

(3) The Fifth Circuit Court has already ruled adversely to plaintiffs' position on all substantive issues of Federal and constitutional law.

(4) If convicted, plaintiffs who are citizens will lose their civil rights and the non-citizens be barred from naturalization.

(c) The Amended Restraining Order violates substantive Federal rights under the Clayton and Norris-La Guardia Acts.

(d) And finally—the only open issue here—that the Rice Order violates plaintiffs' constitutional rights as guaranteed by the First Amendment in that

(1) It constitutes unjustifiable previous restraint upon their rights of free speech and of assembly.

(2) It narrowly and unreasonably circumscribes these rights at the very time when they are of most value and does so without due regard for the size and scope of the industrial conflict involving 100,000 I.L.W.U. members, 12,000 acres of sugar cane land and twenty company towns and villages.

(3) The Order is vague, ambiguous, and confusing and places the risk of contempt unjustly upon the pickets to determine accurately just what it means, what are the points of ingress and egress, whether in any manner any act of theirs "otherwise" had the effect of accomplishing [308] the prohibited acts, and that the "in furtherance" clause in the Order gives its specific prohibition a tentative quality. In short, it is claimed that it is not clear and explicit and unlawfully places the risk of non-obeyance upon men not too well versed in English, let alone the construction of legal language.

In support of their position that the Order violates their constitutional rights, the plaintiffs rely heavily upon——

Whitney vs. California,

274 U.S. 357 (1927) ;

Herndon vs. Lowry,

301 U.S. 242 (1937) ;

Thornhill vs. Alabama,

310 U.S. 88 (1940) ;

Bridges vs. California,

314 U.S. 252, 263 (1941) ;

West Virginia State Board of Education vs.

Barnette, 319 U.S. 624, 638 (1943) ;

Thomas vs. Collins,

323 U.S. 516, 529 (1945) ;

Marsh vs. Alabama,

326 U.S. 501 (1946).

All cases attesting to the special place occupied by the liberties protected by the First Amendment concerning which in *Stapleton vs. Mitchell*, *supra*, Judge Huxman at p. 63, dissenting in part, well summarizes the current law as gathered from the Thomas case as follows—referring first to the usual rule that a statute is presumed to be constitutional——

“But it has no application when sacred constitutional guaranteed rights are involved. Then an entirely different principle must guide us. That is the conclusion I draw from the decision of the Supreme Court in the Thomas

case. The court points out that these constitutional guarantees have a sanctity and solemnity which is not accorded to general rights arising by operation of statutory law. [309] When a regulation impinges one of these rights, it must not only be justified by a clear public interest and be passed to meet a clear and present danger to such right, but it must also be reasonable and must have a reasonable relation to the object sought to be accomplished. In such case, there is no presumption of constitutionality. There is rather a suspicion in the minds of the courts, the guardian of our constitutional liberties, and the burden is upon him who would uphold the interference with such rights to carry the burden of justifying the interference within the test laid down by the Supreme Court in the *Thomas* case. As stated by the Supreme Court, when the right to restrict the exercise of free speech is the subject of inquiry, it is our 'tradition to allow the widest room for discussion, the narrowest range for its restriction.' (323 U.S. 516, 65 S.Ct. 315, 323).''

The plaintiffs argue there was not only no clear and present danger to the public but further the restraint imposed is unreasonable. See *Thornhill vs. Alabama*, *supra*, *Carpenters & Joiners Union vs. Ritter's Cafe*, 315 U.S. 722 (1922), and *Thomas vs. Collins*, *supra*.

In the preliminary stage of this case, it was said that it appeared, subject to a later and fuller exami-

nation of the questions of law based upon the Constitution that in view of the exceptional and unusual circumstances alleged that the plaintiffs had stated a claim for equitable relief. *Alesna vs. Rice*, at p. 901.

Is there, now that these questions of law have been examined in an atmosphere less tense than that existing in February, and in view of *Hall vs. Hawaiian Pineapple Company*, *supra*, any reason to alter the initial ruling?

I am inclined to believe that there is. It does not now appear to me that the plaintiffs' constitutional rights have been invaded by Judge Rice's Restraining Order. [310]

It has already been decided, though to be sure plaintiffs do not agree, that the Territory has the same domestic powers as a state and may "take adequate steps to preserve the peace and protect the privacy, the lives and the property of its residents * * *," *A. F. of L. vs. Swing*, 312 U.S. 321 at 325 (1941). And this it may do by a statute narrowly drawn or by an injunction tailored to fit a specific situation.

Generally speaking, under normal circumstances, no state or Territory can prohibit one's full exercise of his Federal and constitutional rights. Because of Article 6 of the Constitution, the Territory could not, for example, make it a crime for labor to exercise in Hawaii its rights under the Constitution or any federal law any more than a state could. That is what was meant when heretofore the court remarked that the Clayton Act and the Norris-

La Guardia Act did not apply to the Territory “directly” but that Territorial statutes and injunctions must respect labor’s Federal and constitutional rights. But like a state, the Territory may take steps to so regulate, without destroying, these rights of labor that the equally valuable rights of others will be safeguarded and peace and order maintained.

A general statutory restraint upon the liberties guaranteed by the First Amendment is not presumed constitutional but, as noted, is regarded by the courts with suspicion. *Stapleton vs. Mitchell*, *supra*.

But the same rule does not apply to specific injunctions. Restraints thereon by Orders of Courts are presumably valid unless obviously void on their face, for they are deemed to have been carefully drafted by the court to fit a particular situation.

Here, contrary to plaintiffs’ contentions, this Order is not void on its face and may, without resort to the evidence on which it is based, be deemed valid. Although the attack upon the Order is concentrated upon its paragraph (7) and its “in furtherance” clause, it is apparent from a reading of the whole Order that what is prohibited is not the lawful but the unlawful. Omitting the preliminaries, the Order reads:

“Wherefore, you, are hereby restrained and enjoined until the further order of this Court from in any way

“(1) Obstructing or attempting to obstruct, by massing of pickets or otherwise, the ingress to or

egress from the Petitioner's mill, store or other plantation buildings or premises located in the County of Kauai, Territory of Hawaii, of the Petitioner, its employees, or any others who may enter or desire to enter said premises for the purpose of performing work or for other lawful occasion;

“(2) Obstructing or attempting to obstruct, by massing of pickets or otherwise, freedom of movement on or along the public or private roads or ways in or about the Petitioner's premises, of the Petitioner, its employees, or any other persons who may pass or desire to pass on or along said roads or ways for the purpose of performing work or for other lawful occasion;

“(3) Obstructing or attempting to obstruct the free movement in, on or about the Petitioner's premises, of the Petitioner, its employees, or [312] any other persons who may be in, on or about said premises for the purpose of performing work or for other lawful occasion;

“(4) Threatening violence to, intimidating, or coercing, or attempting to intimidate or coerce, the employees of the Petitioner or those seeking employment with the Petitioner, or any persons who are lawfully upon the Petitioner's premises or are proceeding to or from said premises;

“(5) Coercing or intimidating, or attempting to coerce or intimidate, employees of the Petitioner or those seeking employment with the Petitioner, by means of threats concerning the safety or welfare of the families of such employees or the families of those seeking employment with the Petitioner;

or threatening violence to, or coercing or intimidating, or attempting to coerce or intimidate, such families;

“(6) Without express written consent of the occupants thereof, visiting or being at or about the dwelling houses or residence premises belonging to Petitioner and occupied by employees of or persons seeking employment with Petitioner and thereat being offensive, disorderly, threatening or intimidating (in words or actions) towards, and harassing, such occupants, or any of them;

“(7) Mass picketing by assembling in compact groups or congregating in crowds on or near real property of the Petitioner, whether used for business or residence purposes, to thereby [313] prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property by Petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property;

“And in Furtherance Hereof, you are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets in a group at any point and station when stationed at points of ingress to and egress from the Petitioner's property, provided, however, that any pickets in excess of three (3) at any one point and station, shall be in motion and, except when passing each other, shall maintain a distance of not less than ten (10) feet between each other and such picketing as shall be done by them shall not be violative of any of the preceding restrictive provisions hereof; all

pickets being hereby enjoined from picketing other than in a peaceful and lawful manner and from obstructing the Petitioner, its employees, or any other persons lawfully seeking to enter or leave the Petitioner's premises; and all pickets being also enjoined from otherwise committing any of the acts hereinbefore prohibited. Any persons engaged in such picketing as is not hereby restricted or prohibited shall wear arm bands reading "Authorized Picket," or "U. P." "

This Order, read without straining to find defects and ambiguities, is sufficiently clear and explicit as to what is prohibited to guide those affected if they gave it, as they must, a fair reading. And it was not necessary for the court [314] to translate its directions into various foreign languages. If such was necessary, that duty fell upon the Union, not the court.

This Order, intelligently read, in no way restrains plaintiffs' rights to freedom of speech or of assembly. Indeed, it does not even prohibit mass picketing. It simply restrains mass picketing at readily ascertainable and customary points of ingress and egress when such type picketing is for the purpose of interfering with the equally valuable rights of others—owners, employees and other persons lawfully entitled to enter or leave the property unmolested. A mass of pickets in the hundreds at the gates of company property so as to prevent others lawfully entitled to enter or leave is obviously not an exercise of the freedom of utterance, but is an endeavor by a show of physical force to prevent others from having the full advantage of their con-

situational rights. The right to picket may not be so exercised that by physical force or position the rights of non-strikers to work and the rights of property owners to protect and maintain and even operate their property is denied.

Under neither the Constiution nor any Federal law is conduct such as that prohibited by the Order immunized from state or Territorial regulation and it was only such conduct that Judge Rice prohibited. He might even, without interfering with the right to picket peacefully, have deemed the situation to have warranted the prohibition of all mass picketing, but he saw fit only to regulate it at certain places when and only when it was conducted for the purpose or had the effect of blocking ingress and egress. [315]

As a further means of controlling such conduct and assuring others of the full enjoyment of their rights, without danger of physical combat, Judge Rice ordered that at the usual points of ingress and egress the pickets be limited to three and at all other picket points or stations if more than three pickets were used, that they be in motion and at least ten feet apart. Plaintiffs claim that this limitation is unreasonable, that apparently Judge Rice deemed two company but three a crowd. Small though the number is, especially in view of the size of the strike, I cannot find it to be an unreasonable regulation, especially as a temporary measure. The obvious purpose of the regulation again clearly appears to be to secure for others an adequate opportunity to utilize their rights without fear or obstruction, and to that end the Order prohibits

those enjoined from blocking public and private roads and ways. Nor is there merit in the argument that the Order in restraining the International Union as well as its local unit is too general. To be effective, all acting in concert had to be enjoined.

Not only is this Restraining Order not void on its face, but going in back of it, as we may, to the picture of the situation described to Judge Rice by the affidavits and the testimony of the witnesses he heard, it stands revealed that the allegations of the petition were sufficiently supported to warrant the utilization by him of his court's equity powers. Granted that it was an *ex parte* hearing, as allowed by Territorial statute, Ch. 302, R.L.H. (1945), it must still be remembered that this is a Temporary Restraining Order which at no time did plaintiffs or others restrained seek to have modified. They only attack the jurisdiction of the Territorial court. The situation made to appear to Judge Rice by affidavit and evidence was one of increasing tenseness lending reasonable [316] credence to the belief that if things were allowed to continue, with ineffective police control, bloodshed might easily ensue. The described scene was one of mill and store entrances solidly blocked by hundreds of massed pickets preventing anyone from going in or out even for maintenance purposes, of plantation roads blocked, or homes picketed and families threatened, annoyed, and disturbed, and of a rising tempo of non-peace inducing language wherever pickets were assembled. When the record of the evidence presented to Judge Rice is read, it provides a further reason for holding his Order valid.

The Order in no way interferes with plaintiffs' or anyone else's right to assemble peaceably. It simply prohibits reasonably picketing in large numbers, or the assembly of numerous persons for the purpose of blocking entrances and exits, public and private roads and ways so that others may not exercise their rights without fear or obstruction. The right of those on strike to assemble in order to hold a meeting or to hear those who wished to speak is not inhibited so long as that right is not exercised in such a way as to deny to others their rights.

So it is that upon the facts alleged—facts incidentally which do not support plaintiffs' argument that a conspiracy to deny plaintiffs their rights and to single them out for prosecution in order to intimidate others has been alleged in the complaint, and also as these facts are amplified by defendants' speaking motion—I find in point of law that plaintiffs' constitutional rights have not been invaded by the Amended Restraining Order.

There being no genuine issues of fact remaining to be tried, summary judgment for the defendants may be entered. [317]

In the light of this disposition of the case, it is unnecessary to rule upon the question of whether if void the Rice Order would nevertheless support an indictment for contempt on the strength of the recent Lewis case, *supra*. Though unnecessary to decide, it may be remarked that it appears that there is no basis here for an application of the doctrine of *Erie v. Tompkins*, 304 U.S. 64 (1938), and *Waialua Agricultural Co. v. Christian*, 305 U.S.

91 (1938), as this is not a diversity of citizenship case and involves no right dependent upon Territorial law. Whether or not the Territorial courts wish to change the Territorial law on the subject, as revealed by *Dole v. Gear*, 14 H. 554 (1903), *Rose v. Ashford*, 22 N. 469 (1915), and *Sakan v. Ashford*, 23 H. 267 (1916), in the light of what for Federal courts the Supreme Court has decided in the *Lewis* case is not for this court to determine.

The Preliminary Injunction is dissolved and a judgment for defendants may be entered.

Dated at Honolulu, T. H., December 3, 1947.

/s/ J. FRANK McLAUGHLIN,
Judge.

[Endorsed]: Filed Dec. 4, 1947. [318]

[Title of District Court and Cause.]

STIPULATION AND ORDER

C. Nils Tavares, having resigned as Attorney General of the Territory of Hawaii on June 30, 1947, and a stipulation and order having been made and entered herein on the 14th day of August, 1947, substituting Rhoda V. Lewis, the Acting Attorney General of the Territory of Hawaii, as a defendant in place of said C. Nils Tavares as Attorney General of the Territory of Hawaii, as of July 1, 1947, and Walter D. Ackerman, Jr., having been since October 14, 1947, and now being the duly appointed Attorney General of the Territory of Hawaii, it is hereby stipulated by the undersigned that, without prejudice to the proceedings already

had herein, Walter D. Ackerman, Jr., as Attorney General of the Territory of Hawaii, may be substituted as a defendant herein in place of Rhoda V. Lewis, Acting Attorney General of the Territory of Hawaii, as of October 14, 1947, that the answer filed July 21, 1947, the defendants' motion filed July 22, 1947, and the defendants' motion filed September 4, 1947, are hereby adopted and [320] permitted to be adopted by said substituted defendant as and for his answer and motions, that the plaintiffs' motion to strike portions of the answer shall be deemed to apply to the substituted defendant, that the decision of the court filed December 4, 1947, shall be deemed to apply to the substituted defendant, and that the preliminary injunction herein entered on February 20, 1947, and which was still in effect on October 14, 1947, shall be deemed to have applied and apply to the substituted defendant from October 14, 1947, to the date of dissolution thereof.

Dated: Honolulu, T. H., this 20th day of December, 1947.

/s/ HARRIET BOUSLOG,

/s/ MYER C. SYMONDS,

Attorneys for Plaintiffs.

/s/ RHODA V. LEWIS,

Assistant Attorney General of
the Territory of Hawaii.

It Is So Ordered.

/s/ J. FRANK McLAUGHLIN,

Judge of the Above-Entitled
Court.

[Endorsed]: Filed Dec. 20, 1947. [321]

[Title of District Court and Cause.]

**SUGGESTION OF DEATH OF PLAINTIFF
JOSEPH MENDES**

Now comes Harriet Bouslog, one of the attorneys for the plaintiffs in the above-entitled action and informs the court that one of the plaintiffs, Joseph Mendes, is now deceased and suggests that an order of abatement be entered as to said plaintiff.

Dated: Honolulu, T. H., this 20th day of December, 1947.

/s/ HARRIET BOUSLOG.

ORDER OF ABATEMENT

It appearing to the court from the statement of Harriet Bouslog, one of the attorneys for the plaintiffs, that the plaintiff Joseph Mendes is now deceased, and good cause appearing therefor

It Is Hereby Ordered that the action be and the same is hereby abated as to said plaintiff Joseph Mendes.

Dated: Honolulu, T. H., this 20th day of December, 1947.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

[Endorsed]: Filed Dec. 20, 1947. [323]

In the United States District Court for the
District of Hawaii
Civil No. 769

CONSTANCIO R. ALESNA, et al.,

Plaintiffs,

vs.

PHILIP L. RICE, AS JUDGE OF THE CIR-
CUIT COURT OF THE FIFTH JUDICIAL
CIRCUIT OF THE TERRITORY OF HA-
WAI; and C. NILS TAVARES, AS AT-
TORNEY GENERAL OF THE TERRI-
TORY OF HAWAII,

Defendants.

JUDGMENT AND DECREE DISMISSING AC-
TION AND DISSOLVING PRELIMINARY
INJUNCTION

This cause having come on to be heard on the defendants' motion under F.R.C.P. 12 (d) filed July 22, 1947, and defendants' motion under F.R.C.P. 12 and 56 filed September 4, 1947, and

The above motions having been fully argued by counsel, and the court having rendered its written decision thereon December 4, 1947, construing defendants' motions herein as moving for summary judgment, dissolving the preliminary injunction heretofore issued herein, directing that summary judgment for the defendants be entered, and further directing that as a result of the court's rulings on the foregoing, plaintiffs' motion to strike should be denied without argument thereon, now therefore

It Is Hereby Ordered, Adjudged and Decreed that defendants' motions be and they hereby are

sustained, that plaintiffs' motion to strike be and it hereby is denied, [325] that this action be and it hereby is dismissed, and that the preliminary injunction issued herein on February 20, 1947, be and it hereby is dissolved.

Dated at Honolulu, T. H., this 22nd day of December, 1947.

/s/ J. FRANK McLAUGHLIN,
Judge.

Approved as to Form:

/s/ HARRIET BOUSLOG,
/s/ MYER C. SYMONDS,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 22, 1947. [326]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the appellants above named, except Joseph Mendes, deceased, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree, entered in this action on December 22, 1947, dismissing the above-entitled action and dissolving the preliminary injunction herein.

Dated: Honolulu, T. H., December 24th, 1947.

/s/ HARRIET BOUSLOG,
/s/ MYER C. SYMONDS,
GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By /s/ GEORGE R. ANDERSEN,
Attorneys for Appellants.

[Endorsed]: Filed Dec. 24, 1947. [328]

[Title of District Court and Cause.]

PETITION FOR RESTORATION OF
INJUNCTION PENDING APPEAL

To the Honorable J. Frank McLaughlin, Judge of
the Above-Entitled Court:

The petition of the plaintiffs respectfully represent:

That on the 24th day of December, 1947, a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit was filed herein from the judgment and decree dismissing the above-entitled action and dissolving the preliminary injunction herein.

That the defendant Philip L. Rice, as Judge of The Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii, has heretofore granted numerous continuances to plaintiffs to plead to the criminal contempt proceedings referred to in the complaint and has set the said criminal contempt proceedings on his court calendar for plea on the 13th day of January, 1948, and has informed plaintiffs that he intends to proceed forthwith with the trial of petitioners herein for the contempt of the alleged void amended restraining order issued by him; that the said defendant Walter D. Ackerman, Jr., as Attorney General of the Territory of Hawaii, or one of his deputies, or agents, will conduct the prosecution of petitioners at said trial.

That the complaint herein alleges that the said amended restraining order was and is void in that it was issued in violation of the provisions of the Norris-LaGuardia Act.

That the applicability of the Norris-La Guardia Act to the Territory of Hawaii is the issue involved in the appeal in International Longshoremen's & Warehousemen's Union, et al., v. Cable A. Wirtz, et al., now pending in the said United States Circuit Court of Appeals for the Ninth Circuit and numbered 11,568 among the records thereof, and that it is therefore in the best interest of justice to restore the preliminary injunction herein pending the outcome of the appeal therein.

That unless restrained by this court pending the appeal from the judgment and decree dismissing the above-entitled action and dissolving the preliminary injunction herein, the trial of petitioners will proceed as above referred to and as a result thereof petitioners will suffer great and irreparable damage, which injury and damage would [331] not be completely remedied or rectified in the event that the said Court of Appeals for the Ninth Circuit should reverse said judgment and decree made and entered herein.

Wherefore, petitioners pray that this court, pursuant to Section 62 (c) of the Rules of Civil Procedure for the District Courts of the United States, make and enter its order restoring the preliminary injunction heretofore made and entered herein until further order of this court.

Dated: Honolulu, T. H., December 24, 1947.

/s/ HARRIET BOUSLOG,

/s/ MYER C. SYMONDS,

Attorneys for Petitioners.

City and County of Honolulu,
Territory of Hawaii—ss.

Harriet Bouslog, being first duly sworn on oath, deposes and says that she is one of the attorneys for the petitioners in the foregoing petition; that she makes this verification for and on their behalf as none of said petitioners are located in the City and County of Honolulu, T. H., wherein affiant maintains her office; that she has read said petition, knows the contents thereof and that same is true.

/s/ HARRIET BOUSLOG.

Subscribed and sworn to before me this 24th day of December, 1947.

[Seal] /s/ EILEEN N. FUJIMOTO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires July 31, 1951.

[Endorsed]: Filed Dec. 24, 1947. [332]

[Title of District Court and Cause.]

STIPULATION AND ORDER APPROVING STIPULATION

It Is Hereby Stipulated and Agreed by and between Constancio R. Alesna, Jose Bagogo Bernal, Daniel Rodriguez Ferreira, Yutaka Gohara, Cornel Iha, Masashi Kageyama, Toroichi Kanda, Frank Gonsalves Perreira, Noboru Takeuchi, Fred Taniguchi, and Genkichi Wada, plaintiffs, and Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii, one of the defendants herein, as follows:

That plaintiffs, upon restoration of the preliminary injunction made and entered herein, pending the appeal taken by the plaintiffs to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree of this court dismissing the action herein and dissolving the said preliminary injunction issued herein on the 20th day of February, 1947, do hereby stipulate and agree that in the proceedings for contempt pending in the Circuit Court of the Fifth Circuit, [334] Territory of Hawaii, entitled Territory of Hawaii vs. Constancio Alesna, et al., being criminal No. 896 among the records of said court, or such other contempt proceeding as may be brought against them based on alleged violations of the amended temporary restraining order issued in that certain action in said circuit court entitled The Lihue Plantation Company, Limited, vs. International Longshoremen's and Warehousemen's Union (C.I.O.) et al.,

being Equity No. 120 among the records of said circuit court, they and each of them shall make and file in said circuit court a stipulation, approved as to form by said defendant, (a) that the Territory of Hawaii shall have the right to perpetuate the Testimony of such witnesses as it deems desirable for the purposes of such contempt proceedings (that is, the proceedings now pending or any other proceedings based on alleged violations of said amended temporary restraining order), (b) that the laws of the Territory of Hawaii governing the method and manner of perpetuating testimony in civil matters shall be followed in perpetuating such testimony, as nearly as may be, (c) that the Territory of Hawaii shall have the right to use at the trial of such contempt proceedings (now pending or hereafter brought) the deposition of any witness who at the time of such trial is dead or insane or whose attendance to testify at such trial cannot be required or obtained pursuant to the powers of the Territory of Hawaii to summon witnesses, and (d) that said plaintiffs do thereby irrevocably waive their right, and each of them does thereby irrevocably waive his right, [335] to be confronted at the trial with such witnesses as may be unavailable for any cause hereinabove specified.

And said defendant hereby stipulates and agrees, in view of the stipulation hereinabove made by the plaintiffs, that the plaintiffs shall likewise have the right to perpetuate the testimony of such witnesses as they deem desirable for the purposes of such contempt proceedings and to use the depositions of such witnesses upon the same terms and conditions as hereinabove provided.

And said defendant, in the event of modification of said preliminary injunction upon its restoration, so as to permit summary contempt proceedings to be instituted against said plaintiffs should the pending indictment for contempt be discontinued, hereby stipulates and agrees that in such event the appeal record herein may be supplemented or amended in such manner as may be required by reason of such a discontinuance and institution of summary contempt proceedings, in order to preserve plaintiffs' appeal; and it is hereby stipulated and agreed between the plaintiffs and the defendant that the appeal upon the record so supplemented or amended may be considered the same as if the summary contempt proceedings had been brought by the Territory in the first instance, instead of the indictment.

Dated at Honolulu, T. H., this 7th day of January, 1948.

/s/ HARRIET BOUSLOG,

/s/ MYER C. SYMONDS,

Attorneys for Plaintiffs.

/s/ RHODA V. LEWIS,

Assistant Attorney General, Attorney for Defendant, Walter D. Ackerman, Jr., Attorney General, T. H.

The foregoing Stipulation is hereby approved.
January 8, 1948.

/s/ J. FRANK McLAUGHLIN,

United States District Judge.

[Endorsed]: Filed Jan. 8, 1948. [337]

[Title of District Court and Cause.]

ORDER RESTORING INJUNCTION
PENDING APPEAL

Upon the reading, filing and consideration of the verified petition of the plaintiffs above named praying for an order restoring the preliminary injunction herein pending the outcome of the appeal filed herein to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree made and entered herein dismissing the above-entitled action for injunction and dissolving the preliminary injunction, and

It appearing to the court from the petition that the defendant Philip L. Rice, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii, has set the criminal contempt proceedings referred to in the complaint on his calendar for plea on January 13, 1948, and has informed plaintiffs that he intends to proceed forthwith with the trial of petitioners herein for contempt of the alleged void amended restraining order issued by him, and [339]

It further appearing to the court from said petition that the defendant Walter D. Ackerman, Jr., as Attorney General of the Territory of Hawaii, or one of his deputies, agents or representatives, will conduct the prosecution of petitioners at said trial, and

It further appearing from the complaint herein that the petitioners allege that they have been deprived of rights guaranteed them under the laws

and Constitution of the United States, and in support of this contention allege that the said amended restraining order was issued in violation of the Norris-La Guardia Act, and was and is void, and

It further appearing to the court from the petition that the applicability of the Norris-La Guardia Act in the courts of the Territory of Hawaii is an issue involved in the appeal in International Longshoremen's & Warehousemen's Union, et al., v. Cable A. Wirtz, et al., now pending in the said United States Circuit Court of Appeals for the Ninth Circuit and numbered 11,568 among the records thereof, and that it would be in the best interest of justice to restore the preliminary injunction herein, pending the outcome of the appeal therein, if means could be found to perpetuate the testimony of the witnesses in said contempt proceedings, and

The plaintiffs having offered to waive their right to be confronted with the witnesses against them, to the extent such witnesses may be unavailable upon the trial of said contempt proceedings or such other contempt proceedings as may be based on alleged violations of said amended [340] temporary restraining order, and plaintiffs accordingly having entered into a stipulation relating to such waiver of the right of confrontation and relating to the perpetuation of testimony, this day filed and approved by the court, and

It further appearing to the court from defendant Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii, that prior to the deter-

mination of said appeal, said indictment for contempt may be discontinued and summary contempt proceedings instituted against plaintiffs, based on the same alleged violation of the said amended Temporary Restraining Order, which could not be done if said Preliminary Injunction is restored pending the appeal unless it is modified as hereinafter set forth, and

It further appearing to the court that by the said stipulation this day filed the defendant Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii, has stipulated and agreed that in the event the pending indictment for contempt should be discontinued and summary contempt proceedings instituted against said plaintiffs, the appeal record herein may be supplemented or amended in such manner as may be required by reason of such a discontinuance and institution of summary contempt proceedings, in order to preserve plaintiffs' appeal, and further the plaintiffs and defendant have stipulated and agreed that the appeal upon the record so supplemented or amended may be considered the same as if the summary contempt proceedings had been brought by the Territory in the first instance, instead of the indictment.

And the court being fully advised in the premises and it being a proper case for this order, [341]

It Is Hereby Ordered, pursuant to section 62 (c) of the Rules of Civil Procedure for the District Courts of the United States, that the preliminary injunction made and entered herein be and the

same is hereby restored in a modified form, until the further order of this court, and that accordingly defendant Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii, his deputies, agents and representatives be and they are hereby restrained and enjoined, until the further order of this court, from proceeding to trial on that certain indictment for contempt pending in the Circuit Court of the Fifth Circuit, Territory of Hawaii, entitled Territory of Hawaii v. Constancio Alesna, et al., and being Criminal No. 896 among the records of said Circuit Court, or from proceeding to trial on any other contempt charge based on any alleged violation of the amended temporary restraining order issued in that certain action in said Circuit Court entitled The Lihue Plantation Company, Limited, v. International Longshoremen's and Warehousemen's Union (CIO), et al., being Equity No. 120 among the records of said Circuit Court.

Dated at Honolulu, T. H., this 8th day of January, 1948, at 11:35 a.m.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

[Endorsed]: Filed Jan. 8, 1948. [342]

[Title of District Court and Cause.]

STIPULATION AND ORDER APPROVING
STIPULATION

It is hereby stipulated that on January 13, 1948, upon motion of defendant Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii, the defendants Philip L. Rice, as Judge of the Circuit Court for the Fifth Circuit of the Territory of Hawaii, entered a nolle prosequi of the indictment in that certain criminal proceeding entitled Territory of Hawaii v. Constancio R. Alesna, et al., being Criminal No. 896 among the records in said court, which said indictment is the same indictment referred to in the above entitled action.

It is further stipulated that on said January 13, 1948, an Information was filed by the Territory of Hawaii in said Circuit Court for the Fifth Circuit, against plaintiffs above named except Ralph Joseph Mendes, which information arose out of the same incident, occasion, occurrence or series of occurrences at the same time and place, as that involved in the indictment [344] and is based on the same alleged violations of a certain amended Temporary Restraining Order as set forth in the indictment, a copy of said information being attached hereto and marked Exhibit A.

It is further stipulated that pursuant to, and in accordance with, the stipulation hereto made and entered herein and approved by the above entitled court and the order restoring injunction pending

appeal herein, that said information be and it is hereby made part of the above entitled action in place and stead of the indictment with the same force and effect as though said information had been the subject matter of the complaint herein instead of the indictment, and that the appeal herein shall apply to the information the same as if the summary contempt proceedings had been brought by the Territory in the first instance, instead of the indictment.

Dated January 20th, 1948, Honolulu, T. H.

/s/ HARRIET BOUSLOG,

/s/ MYER C. SYMONDS,

GLADSTEIN, ANDERSEN,

RESNER & SAWYER,

By /s/ GEORGE R. ANDERSEN,

Attorneys for Appellants.

/s/ RHODA V. LEWIS,

Assistant Attorney General,

/s/ MICHIO WATANABE,

Attorneys for Appellees.

The foregoing Stipulation is hereby approved.
January 20, 1948.

/s/ J. FRANK McLAUGHLIN,

United States District Judge.

In the Circuit Court of the Fifth Circuit
Territory of Hawaii

S. P. 73

At Chambers

In the Matter of the Contempt of Court of
CONSTANCIO R. ALESNA, JOSE BAGOGO
BERNAL, DANIEL RODRIGUES FER-
REIRA, YUTAKA GOHARA, CORNEL
IHA, MASASHI KAGEYAMA, TOROICHI
KANDA, FRANK GONSALVES PER-
REIRA, NOBORU TAKEUCHI, FRED
TANIGUCHI, and GENKICHI WADA,
Respondents.

SUMMARY CONTEMPT PROCEEDINGS
INFORMATION AND EXHIBIT A

Filed at 10:30 o'clock a.m., January 13, 1948.
Kazue Imamura, Clerk, Circuit Court, Fifth
Circuit.

I do hereby certify the within Information and
Exhibit A thereto attached to be full, true and cor-
rect copies of the originals thereof now on file in
the above-entitled Court and cause.

Witness my hand and the Seal of said Court this
13th day of January, A.D. 1948.

/s/ SAMUEL H. KIMURA,
Clerk, Circuit Court,
Fifth Circuit.

Walter D. Ackerman, Jr., Attorney General, Ter-
ritory of Hawaii. [346]

INFORMATION

To the Honorable, the Presiding Judge Sitting at
Chambers, in Special Proceedings:

First Count

1. Now comes the Territory of Hawaii, by Walter D. Ackerman, Jr., Attorney General of said Territory, on his official oath, and, complaining of the respondents above named, who are also mentioned by name in paragraph 3 of this Information, represents to the Court:

2. That at Lihue, County of Kauai, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the 23rd day of September 1946, a certain lawful order, called an "Amended Temporary Restraining Order" (hereinafter in this Court and elsewhere in this Information referred to as the "order"), was duly and lawfully made, entered and issued by and in the name of the Honorable Philip L. Rice, Circuit Judge, at Chambers, Fifth Circuit, Territory of Hawaii, in a cause entitled "Equity No. 120, in the Circuit Court of the Fifth Circuit, Territory of Hawaii, at Chambers, in equity, The Lihue Plantation Company, Limited, Petitioner, vs. International Longshoremen's and Warehousemen's Union (CIO), Local [347] 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149, of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Pontanilla, Thomas Takemoto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benja-

min Lida, George Nasaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Doe, et al., Respondents,” said parties being hereinafter referred to as the “petitioner” and the “general respondents,” respectively, a true and correct copy of which order is hereto attached, marked “Exhibit A,” and made a part hereof, which order was directed in the name of the Territory of Hawaii to the general respondents and by which said order respondents were restrained and enjoined from, among other things, in any way mass picketing by assembling in compact groups or congregating in crowds on or near real property of the petitioner, whether used for business or residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property by said petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property; that, pursuant to an order of service made and entered by said Court at Lihue aforesaid on said 23rd day of September 1946, commanding the service of copies of said order, a certified copy of said order was duly served on each of said general respondents by handing and delivering to and leaving with each of them personally, and with an officer of said International Longshoremen’s and Warehousemen’s Union (CIO) and an officer of said Local 149 of said International Longshoremen’s and Warehousemen’s Union (CIO), a certified copy thereof on said date in the Territory of Hawaii and within the jurisdiction of said Court. [348]

3. That, notwithstanding said order, the respondents herein, Constancio R. Alesna, Jose Bago Bernal, Daniel Rodrigues Ferreira, Yutaka Gohara, Cornel Iha, Masashi Kageyama, Toroichi Kanda, Frank Gonsalves Perreira, Noboru Takeuchi, Fred Taniouchi and Genkichi Wada (all of which said last mentioned respondents are hereinafter referred to as the "accused respondents"), at Hanamaulu, in the County of Kauai, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 10th day of October 1946, did unlawfully and wilfully disobey and violate said order by then and there mass picketing by assembling with large numbers of divers and sundry persons, to said Attorney General unknown, in compact groups and congregating with such persons in crowds on and near certain real property of the petitioner used for business purposes, to-wit, the Hanamaulu Shop, to thereby prevent and attempt to prevent and physically obstruct and interfere with ingress to and egress from said real property by the petitioner, its employees, including Alfred G. Perreira, Eddie Medeiros, Manual Medeiros, William Farias, Manuel Bugado and Ernest S. Carvalho III, and each of them, and other persons lawfully seeking to enter and leave said real property, the said accused respondents, and each of them, then and there being members of said International Longshoremen's and Warehousemen's Union (CIO) and of Local 149 of said International Longshoremen's and Warehousemen's Union (CIO), general respondents hereinabove mentioned, and said accused

respondents then and there having notice and knowledge of said order, and so in manner and form aforesaid, they, the said accused respondents, and each of them, did unlawfully and wilfully and knowingly disobey and violate said order and were then and there and thereby and now are in contempt of this Honorable Court. [349]

SECOND COUNT

4. And the said Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii, on his official oath, in order to charge a further violation of the order hereinabove and hereinafter mentioned, arising out of the same acts and transactions hereinabove set forth in the First Count of this Information, does further represent to the Court:

5. That at Lihue, County of Hawaii, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the 23rd day of September 1946, a certain lawful order, called an "Amended Temporary Restraining Order" hereinafter in this Count and elsewhere referred to as the "order"), was duly and lawfully made, entered and issued by and in the name of the Honorable Philip L. Rice, Circuit Judge, at Chambers, Fifth Circuit, Territory of Hawaii, in a cause entitled "Equity No. 120, in the Circuit Court of the Fifth Circuit, Territory of Hawaii, at Chambers, in Equity, The Lihue Plantation Company, Limited, Petitioner, vs. International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1,

Local 149, of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Take-moto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Doe, et al., Respondents," said parties being hereinafter referred to as the "petitioner" and the "general respondents," respectively, a true and correct copy of which order is hereto attached, marked "Exhibit A," and made a part hereof, which order was directed in the name of the Territory of Hawaii to said general respondents and by which said order [350] said general respondents were, among other things, ordered to limit the number of pickets used by said general respondents to not more than three pickets in a group at any point and station when stationed at points of ingress to and egress from the petitioner's property; that, pursuant to an order of service made and entered by said Court at Lihue aforesaid on said 23rd day of September 1946, commanding the service of copies of said order, a certified copy of said order was duly served on each of said general respondents by handing and delivering to and leaving with each of them personally, and with an officer of said International Longshoremen's and Warehousemen's Union (CIO) and an officer of said Local 149 of said International Longshoremen's and Warehousemen's Union (CIO), a certified copy thereof on said date in the Territory of Hawaii and within the jurisdiction of said Court.

C. That, notwithstanding said lawful order, the respondents herein, Constancio R. Alesna, Jose Bagogo Bernal, Daniel Rodriques Ferreira, Yutaka Gohara, Cornel Iha, Masashi Kageyama, Toroichi Kanda, Frank Gonsalves Ferreira, Noboru Takeuchi, Fred Taniguchi and Genkichi Wada (all of which said last mentioned respondents are hereinafter referred to as the "accused respondents"), at Nanamaulu, in the County of Kauai, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 10th day of October 1946, did unlawfully and wilfully disobey and violate said order by then and there picketing with large numbers of divers and sundry persons, to the said Attorney General unknown, in groups of more than three pickets at points of ingress to and egress from the petitioner's property, to-wit: the Hanamaulu Shop, the said accused respondents, and to each of them, then and there [351] being members of said International Longshoremen's and Warehousemen's Union (CIO) and of Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), general respondents hereinabove mentioned, and said accused respondents then and there having notice and knowledge of said order, and so in manner and form aforesaid, they, the said accused respondents, and each of them, did unlawfully and wilfully and knowingly disobey and violate said order and were then and there and thereby and now are in contempt of this Honorable Court.

Wherefore, the said Attorney General, for and on behalf of the said Territory, moves this Court for a rule upon the said respondents, Constancio R. Alesna, Jose Bagogo Bernal, Daniel Rodriques Ferreira, Yutaka Gohara, Cornel Iha, Nasashi Kageyama, Toroichi Kanda, Frank Gonsalves Perreira, Noboru Takeuchi, Fred Taniguchi and Genkichi Wada to be and appear before this Honorable Court, on a day to be named, and show cause, if any they or any of them have, why they would not be adjudged guilty of and punished for contempt of this Honorable Court in respect of each and all of the aforesaid contemptuous acts.

Dated at Honolulu, T. H., this 12th day of January, 1948.

/s/ WALTER D. ACKERMAN, JR.,
Attorney General of the
Territory of Hawaii.

EXHIBIT A

[Title of Circuit Court and Cause.]

AMENDED TEMPORARY RESTRAINING
ORDER

Filed at 2:16 o'clock p.m., September 23, 1946.

SAMUEL H. KIMURA,

File Clerk, Circuit Court, Fifth Circuit, Territory
of Hawaii. [353]

Territory of Hawaii: To the International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Roe, et al., Greetings:

Whereas, The Lihue Plantations Company, Limited, has filed herein a petition against you praying to be relieved touching the matters therein set forth; and

Whereas, an order to show cause issued from and under the seal of this Court ordering you to appear before [354] the undersigned, Judge of the above-entitled Court, on Friday, the 27th day of September, 1946, at the hour of 9 o'clock a.m., and

Whereas, a Motion for Temporary Restraining Order was also filed and, by supporting affidavits and evidence adduced by the Petitioner at the time

of the filing of the petition in the above-entitled proceeding, it appeared that the acts therein specified and complained of will continue unless restrained pending a hearing on the petition in the above-entitled proceedings; and

Whereas, pursuant to the prayer of said petition and the said motion, a Temporary Restraining Order was issued on the 17th day of September, 1946, and subsequently the Respondents, by Richard Gladstein, acting in their behalf and as their attorney, entered an appearance and presented an oral motion to dissolve and vacate said Temporary Restraining Order, and a hearing thereon was had before the Court, to-wit, the undersigned, the Circuit Judge of the Fifth Circuit, Territory of Hawaii, at Chambers, In Equity, Petitioners being represented thereat by Attorneys Montgomery E. Winn and E. C. Moore, of Vitousek, Pratt, and Winn, and Dudley C. Lewis, Esq., Deputy Attorney General of the Territory of Hawaii, appearing at the request of the Court and as *amicus curiae*, and the Court, after hearing and considering argument on said motion having over-ruled the same and having given notice to the parties to appear at, and continued proceedings until the 23d day of September, 1946, so that the parties might then be advised if the Court should then, upon its own initiative, modify, the aforesaid Temporary Restraining Order;

Now Therefore, after consideration and deliberation, the Court does, on this 23d day of September, 1946, modify the [355] aforesaid Temporary Restraining Order and

It Is Ordered that said Temporary Restraining Order be, and it hereby is modified to the extent hereof and by substitution therefor of this Amended Temporary Restraining Order;

Wherefore, you, International Longshoremen's and Warehousemen's Union (CIO), Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union (CIO), Joseph Nunes, Daniel Rapozo, Fernando Fontanilla, Thomas Takemoto, Sunao Iwamoto, William Paia, Yoshikazu Morimoto, Benjamin Iida, George Masaki, Charles Morita, Ronald Toyofuku, Taku Akama, John Doe, Mary Doe, Richard Roe, et al., are hereby restrained and enjoined until the further order of this Court from in any way

(1) Obstructing or attempting to obstruct by massing of pickets or otherwise, the ingress to or egress from the Petitioner's mill, store or other plantation buildings or premises located in the County of Kauai, Territory of Hawaii, of the Petitioner, its employees, or any others who may enter or desire to enter said premises for the purpose of performing work or for other lawful occasion;

(2) Obstructing or attempting to obstruct, by massing of pickets or otherwise, freedom of movement on or along the public or private roads or ways in or about the Petitioner's premises, of the Petitioner, its employees, or any other persons who may pass or desire to pass on or along said roads

or ways for the purpose of performing work or for other lawful occasion;

(3) Obstructing or attempting to obstruct the free movement in, on or about the Petitioner's premises, of the [356] Petitioner, its employees, or any other persons who may be in, on or about said premises for the purpose of performing work or for other lawful occasion;

(4) Threatening violence to, intimidating, or coercing, or attempting to intimidate or coerce, the employees of the Petitioner or those seeking employment with the Petitioner, or any persons who are lawfully upon the Petitioner's premises or are proceeding to or from said premises;

(5) Coercing or intimidating, or attempting to coerce or intimidate, employees of the Petitioner or those seeking employment with the Petitioner, by means of threats concerning the safety or welfare of the families of such employees or the families of those seeking employment with the Petitioner; or threatening violence to, or coercing or intimidating, or attempting to coerce or intimidate, such families;

(6) Without express written consent of the occupants thereof, visiting or being at or about the dwelling houses or residence premises belonging to Petitioner and occupied by employees of or persons seeking employment with Petitioner and thereat being offensive, disorderly, threatening or intimidating (in words or actions) towards, and harassing, such occupants or any of them;

(7) Mass picketing by assembling in compact groups or congregating in crowds on or near real property of the Petitioner whether used for business or residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property by Petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property; [357]

And in Furtherance Hereof, you are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets in a group at any point and station when stationed at points of ingress to and egress from the Petitioner's property, provided, however, that any pickets in excess of three (3) at any one point and station, shall be in motion and, except when passing each other, shall maintain a distance of not less than ten (10) feet between each other and such picketing as shall be done by them shall not be violative of any of the preceding restrictive provisions hereof; all pickets being hereby enjoined from picketing other than in a peaceful and lawful manner and from obstructing the Petitioner, its employees, or any other persons lawfully seeking to enter or leave the Petitioner's premises; and all pickets being also enjoined from otherwise committing any of the acts hereinbefore prohibited. Any persons engaged in such picketing as is not hereby restricted or pro-

hibited shall wear arm bands reading "Authorized Picket," or "U. P."

Dated: Lihue, Kauai, T. H., September 23, 1946.

[Seal]

PHILIP L. RICE,

Circuit Judge, Fifth Circuit,
Territory of Hawaii.

I hereby certify that the foregoing is a full, true and correct copy of the original filed in the above-entitled court and cause.

[Seal]

SAMUEL H. KIMURA,

File Clerk, Circuit Court, Fifth Circuit, Territory
of Hawaii.

[Endorsed]: Filed Jan. 20, 1948. [358]

In the United States District Court for the
District of Hawaii

Civil No. 769

CONSTANCIO R. ALESNA, et al.,

Plaintiffs,

vs.

PHILIP L. RICE, AS JUDGE OF THE CIR-
CUIT COURT FOR THE FIFTH JUDI-
CIAL CIRCUIT OF THE TERRITORY OF
HAWAII, et al.,

Defendants.

DESIGNATION OF RECORD
ON APPEAL

To the Clerk of the United States District Court
for the District of Hawaii:

Please prepare and certify a transcript of the
record in this case to be filed with the Clerk of the

United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal herein, and include in said transcript the following:

1. Complaint for Injunction, Order to Show Cause, and Temporary Restraining Order (with Exhibits).

2. Summons.

3. Order to Show Cause and Temporary Restraining Order.

4. Defendants' Objections to Allowance of Preliminary Injunction.

5. Ruling upon Motion for a Preliminary Injunction.

6. Preliminary Injunction.

7. Answer to Complaint of Philip L. Rice—Exhibits A and B. [360]

8. Answer to Complaint of C. Nils Tavares.

9. Motion for Hearing and Determination of Defenses Before Trial and Notice of Motion.

10. Motion to Strike and Notice of Motion.

11. Stipulation and Order, dated August 14, 1947.

12. Motion (to consider whole record), dated September 4, 1947.

13. Decision upon Motion for Determination of Defenses in Advance of Trial.

14. Suggestion of Death of Plaintiff Joseph Mendes and Order of Abatement.

15. Stipulation and Order, filed December 20, 1947.

16. Judgment and Decree Dismissing Action and Dissolving Preliminary Injunction.

17. Notice of Appeal.

18. Petition for Restoration of Injunction Pending Appeal.

19. Stipulation and Order Approving Stipulation.

20. Order Restoring Injunction Pending Appeal.

21. Stipulation and Order dated January 20, 1948, with Exhibit.

22. This Designation of Record on Appeal.

Dated: Honolulu, T. H., this 22nd day of January, 1948.

/s/ HARRIET BOUSLOG,

/s/ MYER C. SYMONDS,

GLADSTEIN, ANDERSEN,

RESNER & SAWYER,

By /s/ GEORGE R. ANDERSEN,

Attorneys for Appellants.

[Endorsed]: Filed Jan. 22, 1948. [361]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE AND
DOCKET RECORD WITH THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

Upon application of Myer C. Symonds, one of the attorneys on record for the appellants herein, and good cause appearing therefore:

It Is Hereby Ordered that the time for the appellants to file the record on appeal and docket the action with the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including March 3, 1948.

Dated: Honolulu, T. H., Jan. 27, 1948.

/s/ J. FRANK McLAUGHLIN,

United States District Judge.

[Endorsed]: Filed Jan. 27, 1948. [363]

[Title of District Court and Cause.]

BOND ON APPEAL

Know all men by these presents, that Constancio R. Alesna, on behalf of himself and Jose Bagogo Bernal, Daniel Rodriguez Ferreira, Yutaka Gohara, Cornel Iha, Masashi Kageyama, Torichi Kanda, Frank Gonsalves Perreira, Noboru Takeuchi, Fred Taniguchi, and Genkichi Wada, as principals, and United States Fidelity and Guaranty Company, a corporation duly licensed to carry on business in the Territory of Hawaii, as surety, are held and

firmly bound unto the defendants above-named, hereinafter called the "Appellees," in the sum of Two Hundred Fifty Dollars (\$250.00) for the payment of which well and truly to be made, we bind ourselves and our successors and assigns, jointly and severally, and firmly by these presents. [365]

The condition of this obligation is such that:

Whereas the above bounden principal and the other named petitioners have filed their Notice of Appeal from the United States District Court for the District of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the final Judgment and Decree of this court made and entered in the above-entitled cause on the 22nd day of December, 1947.

Now, Therefore, if the said principal and the other named petitioners shall prosecute their appeal with effect and answer all costs if they fail to sustain said appeal, then this obligation shall be void, otherwise it remains in full force and effect.

Sealed with our seal, and dated this 5th day of February, 1948.

/s/ CONSTANCIO R. ALESNA,
UNITED STATES FIDELITY
& GUARANTY COMPANY,

[Seal] By /s/ HERMAN LUIS,

Its Attorney in Fact.

Territory of Hawaii,
County of Kauai—ss.

On this 5th day of February, A.D. 1948, before me appeared Constancio R. Alesna, to me personally known, who being by me duly sworn, did say that

he is the principal named in the foregoing Bond on Appeal and that he acknowledged said instrument as his free act and deed.

[Seal] /s/ NEIL ROBERTSON,
Notary Public, Fifth Judicial Circuit, Territory of
Hawaii.

My Commission Expires June 30, 1949. [366]

Territory of Hawaii,
City and County of Honolulu—ss.

On this 9th day of February, 1948, before me personally appeared Herman Luis, to me personally known, who being duly sworn did say that he is the Attorney-in-Fact of the United States Fidelity and Guaranty Company, duly appointed under Power of Attorney dated the 8th day of April, 1931, which Power of Attorney is now in full force and effect, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation under the authority of its Board of Directors, and said Herman Luis acknowledged said instrument to be the free act and deed of said corporation.

 /s/ J. D. MARQUIS,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission Expires July 17th, 1949.

The foregoing bond is hereby approved as to form, amount and sufficiency of surety.

 /s/ J. FRANK McLAUGHLIN,
U. S. District Judge.

[Endorsed]: Filed Feb. 10, 1948. [367]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO TRANSCRIPT OF RECORD
ON APPEAL

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing pages numbered 1 to 367, inclusive, are a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and that the costs of the foregoing transcript of record are \$43.50 and that said amount has been paid to me by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 18th day of February, 1948.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of
Hawaii.

[Endorsed]: No. 11872. United States Circuit Court of Appeals for the Ninth Circuit. Constancio R. Alesna, Jose Bagogo Bernal, Daniel Rodriguez Ferreira, Yutaka Gohara, Cornel Iha, Masashi Kageyama, Toroichi Kanda, Frank Gonsalves Pereira, Noboru Takeuchi, Fred Taniguchi and Genkichi Wada, Appellants, vs. Philip L. Rice, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii and Walter D. Ackerman, Jr., as Attorney General of the Territory of Hawaii, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed March 1, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,872

CONSTANCIO R. ALESNA, JOSE BAGOGO
BERNAL, DANIEL RODRIGUES FER-
REIRA, YUTAKA GOHARA, CORNEL
IHA, MASASHI KAGEYAMA, TOROICHI
KANDA, FRANK GONSALVES PER-
REIRA, NOBORU TAKEUCHI, FRED
TANIGUCHI, and GENKICHI WADA,
Appellants,

vs.

PHILIP L. RICE, AS JUDGE OF THE CIR-
CUIT COURT FOR THE FIFTH JUDI-
CIAL CIRCUIT OF THE TERRITORY OF
HAWAII; and C. NILS TAVARES, AS AT-
TORNEY GENERAL OF THE TERRI-
TORY OF HAWAII,
Appellees.

STATEMENT PURSUANT TO RULE 19,
SUBDIVISION 6

Receipt of a copy of within statement acknowl-
edged 3/18/48.

/s/ RHODA V. LEWIS,

Assistant Attorney General.

To the Clerk of the Above-Entitled Court:

Now come appellants and pursuant to Rule 19,
Subdivision 6, state as follows:

1. Appellants rely on the following points on
the appeal:

(a) The court erred in making and entering its Judgment and Decree dismissing action and Dissolving Preliminary Injunction, on December 22, 1947.

(b) The court erred in concluding that the Amended Temporary Restraining Order did not violate appellants' rights, guaranteed by the First Amendment to the Constitution (1) to freedom of speech, (2) to assemble peaceably.

(c) The court erred in concluding that the Amended Temporary Restraining Order was and is not void upon the ground it is vague, ambiguous and confusing.

(d) The court erred in considering appellees' motion under Rule 12 (d), as no appeal was taken from the order granting the preliminary injunction.

(e) The court erred in sustaining appellees' motion under Rule 12 (d).

(f) The court erred in denying appellants' motion to strike parts of the answer of Appellee Rice without affording appellants the opportunity to be heard thereon.

(g) The court erred in denying appellants' motion to strike parts of the answer of appellee Rice as the court was without jurisdiction to consider said parts.

(h) The court erred in concluding that the Amended Temporary Restraining Order was and is not void upon the ground that it was issued in violation of the provisions of the Norris-La Guardia Act.

(i) The court erred in concluding that the Amended Temporary Restraining Order was and is not void upon the ground that the District Court for the Territory of Hawaii has exclusive jurisdiction in the Territory of Hawaii to issue injunctions in labor disputes.

(j) The court erred in concluding that the Amended Temporary Restraining Order was and is not void upon the ground that it prohibited the free exercise of rights granted to members of a labor union by laws of the United States, to wit, the Norris-La Guardia Act.

(k) The Court erred in concluding that the Amended Temporary Restraining Order did not deprive appellants of free speech and assembly in violation of the first amendment to the Constitution of the United States.

(l) The court erred in its conclusion that a circuit court of the Territory is not a "court of the United States" as defined by and within the meanings of the Norris-La Guardia Act.

(m) The court erred in its conclusion that Congress manifested an intention to and did exclude from the coverage of the Act legislative courts of the United States.

(n) The court erred in failing to give to the Norris-La Guardia Act the same scope and coverage as the Clayton and Sherman Acts which the Norris-La Guardia Act amends.

(o) The court erred in failing to construe the Norris-LaGuardia Act as an exercise by Congress of its plenary power to legislate for the Territory of Hawaii.

(p) The court erred in construing the Norris-La Guardia Act as a narrow procedural act affecting only the jurisdiction of constitutional courts sitting in equity.

(q) The court erred in failing to give effect to the public policy of the United States declared in the Norris-LaGuardia Act.

(r) The court erred in holding that appellee Rice, as Judge of the Circuit Court of the Fifth Judicial Circuit had jurisdiction to issue a temporary restraining order in a case growing out of a labor dispute.

2. Appellants designate for printing the entire transcript of the record as certified to you.

Dated: Honolulu, T. H., this 18th day of March, 1948.

BOUSLOG & SYMONDS,

By /s/ HARRIET BOUSLOG.

GLADSTEIN, ANDERSEN,

RESNER & SAWYER,

By /s/ GEORGE R. ANDERSEN,

Attorneys for Appellants.

[Endorsed]: Filed March 19, 1948.

